

APPENDIX

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 732

MERLE R. SCHNECKLOTH, Superintendent, California
Conservation Center, *Petitioner*

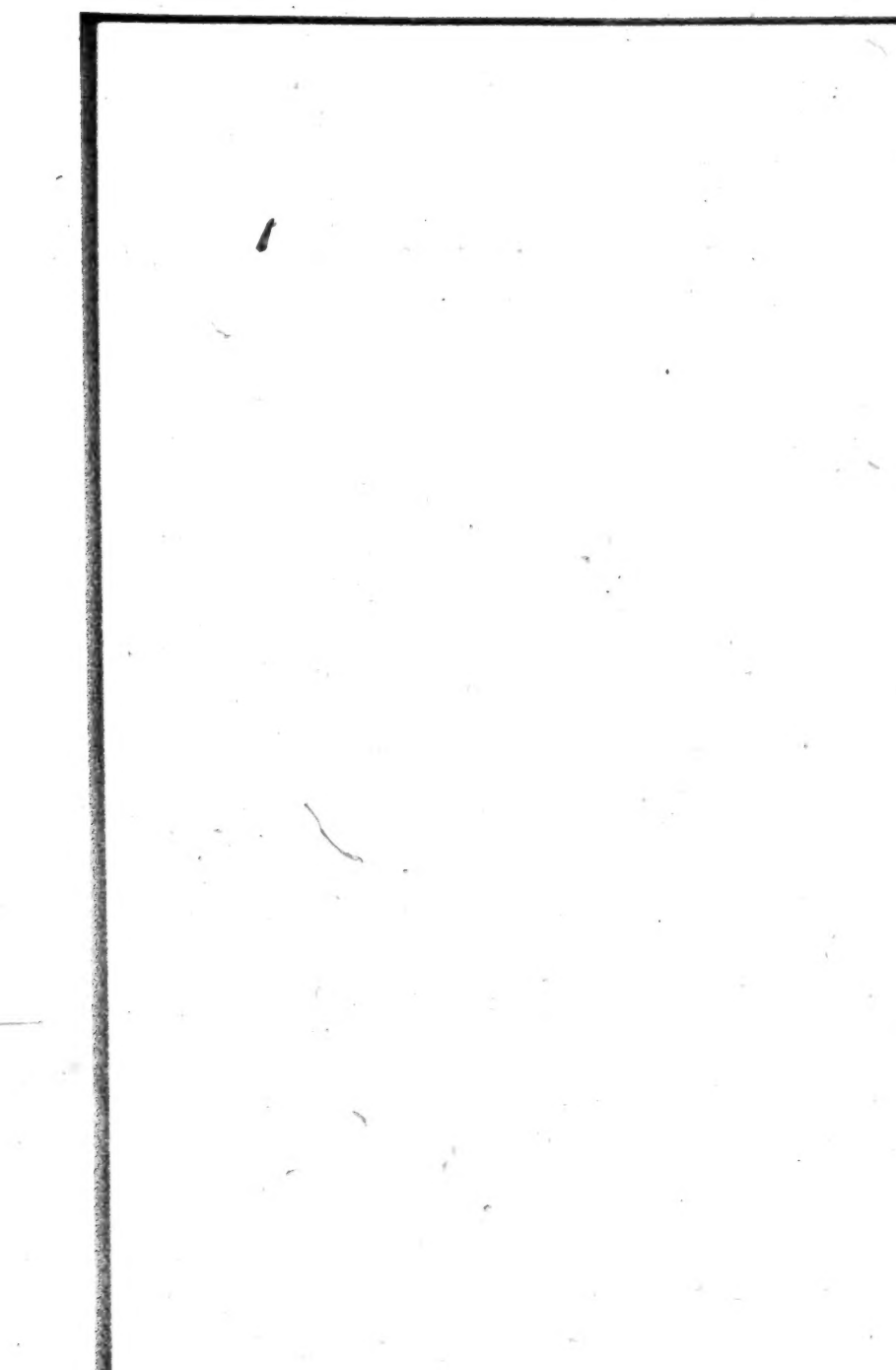
VS.

ROBERT CLYDE BUSTAMONTE, *Respondent*

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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Appendix A

**DOCKET ENTRIES
CIVIL DOCKET
UNITED STATES DISTRICT COURT****C-70-303****AJZ**

ROBERT BUSTAMONTE**vs.****MERLE R. SCHNECKLOTH**

**For Plaintiff: In Pro Per B-8435, Tamal, Calif.
Stuart P. Tobisman, 611 West 6th St., Suite 3800,
Los Angeles, Ca 90017**

**For Defendant: Attorney General State of Calif.,
6000 State Bldg., S.F., Ca**

STATISTICAL RECORD**J.S. 5 mailed 2-10-70****J.S. 6 mailed Feb. 13, 1970****Basis of Action: Petn. for Writ of Habeas Corpus**

Robert Clyde Bustamonte**vs.****Merle R. Schneckloth****Proceedings****1970**

**Feb. 10—Petitioner allowed to process in Forma Pau-
peris (Zirpoli).**

**Feb. 10—1. Filed Petition for Writ of Habeas Cor-
pus.**

- Feb. 10—2. Filed motion by petitioner to Amend petition for Writ of H.C.
- Feb. 10—3. Filed Xerox Copy of State Appellate Court opinion.
- Feb. 10—4. Filed Order denying petition for Writ of Habeas Corpus.
- Feb. 10—Copy mailed to AG and Petitioner.
- Feb. 17—5. Filed petnr's. notice of change of address and mo. to change title of respondent (To Zirpoli).
- Mar. 9—6. Filed Notice of appeal by petitioner.
- Mar. 10—Mailed Clerk's notice of filing appeal.
- Mar. 9—7. Filed Certificate of Probable Cause to Appeal and Order allowing petitioner to proceed on appeal without prepayment of cost. (Zirpoli).
- Apr. 8.—Made, Mailed Record on Appeal CCA.
- Apr. 22—8. Filed receipt from USCA, 9th Cir., for record on appeal, #25678.

UNITED STATES COURT OF APPEALS
For The Ninth Circuit

No. 25678

D. C. No. C-70-303

D. C. Judge Zirpoli

Notice of appeal filed Mar. 9, 1970.

448 Fed. Rep. 2nd P 699.

Civil-HC

DC , Northern California

See Misc # 4987

ROBERT BUSTAMONTE

Plaintiff-Appellant

vs.

MERLE R. SCHNECKLOTH, SUPT

Defendant-Appellee

For Appellant: Stuart P. Tobisman, Esq.

For Appellee: Calif. Atty. Genl., S.F.

Date: 1970—Apr. 9.

Appellant's Account—FP

1970

Apr. 9—Filed Cert. Transc. of Record on Appeal in
I Vol., Pleadings—(FP)

Orig. and 3 copies.

Docketed Cause and Entered Appearances of
Counsel.

Apr. 21—Loaned copy of i volume record to appellant
counsel Tobisman. brief due June 1, 1970.

(retd. record 9/16/70).

Jun. 1, 1970—Filed 4 Appellants Briefs.

Jul. 10, 1970—Filed Motion and Order (C) Extending Time to file appellee's brief to August 1, 1970.

Aug. 5, 1970—Filed Motion and Order (C) Extending Time to file appellee's brief to August 31, 1970.

Aug. 12—Loaned to Atty. Gen. copy of (1) vol. (Ret. 8/31/70) record (to be rtd. with brief).

Aug. 31, 1970.

Sept. 4—Rev'd. from State Atty. Genl. copy of 2 vol. State ct. Transc., in LPS****

Sep. 16, 1970—Filed 4 Appellee's Reply Briefs—Calendared 7/8 S.F.

1971

June 2—Recvd. appellee letter of 6/1 re add'l. authorities (Hm. M. E.).

July 8—Argued and Submitted (HM, M, E).

Sept. 13—Ordered Opinion (Merrill) Filed and Judg. to be Filed and Entd.

Sept. 13—Filed opinion—DC order denying writ is vacated and matter remanded to DC.

Sept. 13—Filed and Entered Judgment.

October 1, 1971—Filed orig. and 3 appellee's application for Stay of Mandate to M.

October 7, 1971—Filed application and order (M) granting Stay of Mandate to November 1, 1971.

Nov. 2, 1971—Filed orig. and 3 appellee's further application for Stay to M.

Nov. 4, 1971—Filed application and order (M) granting Stay of Mandate to December 1, 1971.

- Dec. 1, 1971—Filed orig. and 3 appellee's application for Stay of Mandate to M.
- Dec. 3, 1971—Filed application and order (M) granting Stay of Mandate pending the filing for writ of certiorari to Supreme Court.
- Dec. 8—Recvd. SC notice re: filing pet. for cert. (12/3/71) SC #71-732
- Mar. 7, 1972—State Court Transcripts returned to Attorney General (picked up by messenger)
Received receipt for State Court Transcripts.
- Mar. 10—Filed cert. copy of SC order granting pet. for cert. (HM, M, E).
- Mar. 13—Issued certified copy of record to Clk., SC, for cert. ht.
- Mar. 20—Received Receipt for [sic]

Appendix B

**United States Court of Appeals
for the Ninth Circuit**

Robert Bustamonte,
Plaintiff-Appellant,

vs.

Merle R. Schneckloth, Superintendent,
California Conservation Center,
Defendant-Appellee.

} No. 25,678

[September 13, 1971]

On Appeal from the United States District Court
for the Northern District of California

Before: HAMLIN, MERRILL and ELY, Circuit
Judges

MERRILL, Circuit Judge:

This appeal is taken from an order of the District Court denying without hearing appellant's petition for a writ of habeas corpus.

On April 21, 1967, appellant was convicted in the California Superior Court for Santa Clara County of a violation of California Penal Code §475(a): possession of a completed check with intent to defraud. Judgment was affirmed on appeal to the California

District Court of Appeal. *People v. Bustamonte*, 270 Cal.App.2d 648 (1969). Hearing was denied by the State Supreme Court.

In his petition for habeas corpus Bustamonte asserts that his state conviction resulted from a refusal of the state trial court to suppress evidence obtained as the result of an unlawful search and seizure.

In January, 1967, the proprietor of a carwash in Mountain View discovered that his business office had been broken into and that a check protector and a number of blank checks had been stolen. Later that month a Ford car with six occupants, one of whom was appellant, was stopped by a Sunnyvale police officer at approximately 2:40 A.M. The officer had noticed that a headlight and the license-plate light were burned out. He asked the driver for his license. When the driver failed to produce one the officer asked the other occupants for identification. Only Joe Alcala, who stated he had borrowed the car from his brother, produced a driver's license. After further discussion the officer asked the six occupants to step out. A traffic citation was issued for the defective lights, as well as for the driver's failure to produce a license. After being joined by another officer, the first officer then questioned each of the occupants. A third police car arrived. The first officer then asked Alcala if he could search the car, and Alcala consented. Alcala was not advised that he had the right to refuse to consent, nor are we referred to any indication in the record that he had knowledge of such right. Three checks of the carwash were found wadded up under the left

rear seat. Each was signed in the name of the owner of the carwash and was filled in by resort to a check protector. On the basis of statements later obtained from the driver of the car, a warrant was obtained for the search of two other cars. These searches resulted in the seizure of the check protector and several blank checks.

The principal contention made on this appeal is that the state trial court erred in refusing to suppress the evidence obtained in the search of the Ford. The state courts proceeded on the theory that the search had been consented to and was therefore lawful. Appellant takes issue with this determination on the ground that the Government has failed to demonstrate that the consent was given with knowledge that it could be withheld.

At the time of the search there was no probable cause to believe that the car contained anything that could properly be seized. The search, thus, was one from which Alcala had a constitutional right to be free.¹ Any consent to the search, then, amounted to a waiver of a constitutional right and, to be effective, must meet the established standards for constitutional waiver.

These have been discussed by this court in *Cipres v. United States*, 343 F.2d 95 (9th Cir. 1965), and

¹The other occupants of the car also have standing to assert Alcala's right. *Jones v. United States*, 362 U.S. 257 (1960); compare *Cotton v. United States*, 371 F.2d 385, 390-91 (9th Cir. 1967), with *Diaz-Rosendo v. United States*, 357 F.2d 124, 132 (9th Cir. 1966) (*en banc*).

Schoepflin v. United States, 391 F.2d 390 (9th Cir. 1968).

" * * * a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld * * *." *Cipres v. United States*, 343 F.2d 95, 97 (9th Cir. 1965).²

From the record before us it is not clear that the California courts have made an adequate finding of the necessary understanding. With reference to Bustamonte's knowledge, the California Court of Appeal, *People v. Bustamonte*, 270 Cal.App.2d at 653, stated:

"The basic premise behind the California rule was stated in *People v. MacIntosh* [264 A.C.A. 834] at page 838: 'When permission is sought from a person of ordinary intelligence the very fact that consent is given * * * carries the implication that the alternative of a refusal existed.'"

It would appear that the California courts, in addition to finding that the atmosphere was not coercive, have relied entirely on the verbal expression of assent. They have reasoned that the mere request for consent carries with it an implication that consent may be withheld and that knowledge of this implication may be

²We find nothing in the Supreme Court's opinion in *Bumper v. North Carolina*, 391 U.S. 543 (1968), to cast doubt on the continued vitality or breadth of these principles. On the contrary, *Bumper*, although not concerned with the issue before us now, expressly approved a number of lower court opinions which had required that waiver of Fourth Amendment rights be both uncoerced and intelligent.

inferred from assent. Yet, as we have noted, mere verbal assent is not enough. Further, in our view, the "implication" apparently relied upon by the California courts can hardly suffice as a general rule. Under many circumstances a reasonable person might read an officer's "May I" as the courteous expression of a demand backed by force of law.

We conclude that the District Court should direct its attention to the issue of the existence of such knowledge as is required under *Cipres* and *Schoepflin*. If it concludes that no adequate and acceptable state court finding has been made upon this issue, then it should make its own finding, conducting a hearing if necessary to develop the facts.

We find no error in the District Court's rulings with respect to other grounds asserted in the petition.

The District Court order denying writ is vacated and the matter is remanded for further proceedings.

Appendix C

United States District Court
for the Northern District of California

C-70 303

Robert Clyde Bustamonte,	}
vs.	
Merle R. Schneekloth, Superintendent, California Conservation Center,	
Respondent.	

**ORDER GRANTING MOTION TO FILE IN
FORMA PAUPERIS AND DENYING
PETITION FOR WRIT OF HABEAS CORPUS.**

Petitioner alleges that the search of two automobiles which produced the checks in question was unconstitutional. He argues that the affidavit supporting the search warrant was defective in that the informant was not proven to be reliable, and there were no underlying facts to allow the magistrate to make an independent judgment. As the California Court of Appeals decision points out, the situation in which the informant was found lent credence to his reliability. Regarding the element of underlying facts, this was satisfied by the corroboration of the informant's

facts. *People v. Bustamonte*, 270 A.C.A. 707, 714-15 (1969).

Petitioner's claim that there was no consent to the search is unsubstantiated.

Petitioner's third claim is that the trial court erred in allowing the policeman to testify that the petitioner said in response to *Miranda* warnings, "I don't care to say anything." This error does not, in view of the circumstances, meet the constitutional test of prejudicial error. See *Chapman v. California*, 386 U.S. 18 (1967).

It Is Hereby Ordered that the petition for a writ of habeas corpus be denied.

Dated: February 6, 1970.

Alfonso J. Zirpoli,
United States District Judge

Appendix D

*In the Court of Appeal
State of California
First Appellate District*

DIVISION ONE

1 Criminal No. 6455

People of the State of California, Plaintiff and Respondent, vs. Robert Clyde Bustamonte, Defendant and Appellant.	}
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OPINION

Defendant appeals from a judgment of conviction, following a jury trial, of possession of a completed check with intent to defraud (violation of Pen. Code, § 475a). Defendant contends that the trial court erred in failing to grant his motions to suppress evidence taken in two separate searches of automobiles, and further that the trial court erred in denying his motion for a mistrial because of a comment on his silence made at the trial by a police officer testifying as a prosecution witness.

The Facts

On the morning of January 19, 1967, Charles Kehoe, owner of the Speedway Car Wash in Mountain View, discovered that the business office had been burglarized some time since he had closed on the previous day. A check-writing machine, known as a check protector, and a number of blank checks had been removed from the office.

On January 21, 1967, Joe Gonzales and Joe Alcala went with defendant to the Food Fair Market in Mountain View. According to the testimony of Gonzales, defendant filled out a check while they were in the parking lot. This check was a Speedway Car Wash check "protectorized" in the amount of \$63.75 and defendant made it out to a "Joe Garcia" and signed it with Kehoe's name. Gonzales took the check into the market where he cashed it in the process of buying a carton of cigarettes. Kehoe identified the check payable to Garcia and stated the signature was not his. After cashing the check on January 21, defendant, Gonzales and Alcala went to defendant's home. Gonzales saw defendant and Alcala lean over the open trunk of defendant's parked Oldsmobile automobile and then the two returned to the truck where Gonzales was waiting, bringing with them two additional Speedway Car Wash blank checks. The amounts of money were filled in on the checks but no names or signatures were entered. The men next unsuccessfully attempted to cash another check at the Blue Bonnett Bar in Sunnyvale.

Gonzales testified that at some time before the incidents of January 21 defendant had shown him the check protector and some blank checks which were contained in the trunk of a Camaro automobile which had been rented by defendant.

On January 31, 1967, defendant, Alcalá and Gonzales went to San Jose to find persons willing to use false identification for the purpose of cashing checks. At about 11:00 p.m. they picked up three other men. Attempts to cash checks at grocery stores and a bar were futile. During the evening they stopped at the Moonlite Shopping Center where Gonzales saw defendant take some checks from defendant's Renault automobile which was in the parking lot.

Police Officer James Rand of the Sunnyvale Department of Public Safety was in a police vehicle alone on routine patrol at approximately 2:40 a.m. on January 31, 1967. He observed an oncoming vehicle which had only one functioning headlight. Rand made a U-turn and also observed that the automobile in question did not have an automobile license plate light. He stopped the automobile which was a black 1958 Ford 4-door sedan. Six men were in the automobile at the time it was stopped, and Rand testified that defendant was in the front seat along with Alcalá, and that Gonzales was driving. After Gonzales failed to produce a driver's license, officer Rand asked if any of the occupants of the Ford had identification. Only Alcalá produced a driver's license and he indicated that the automobile belonged to his brother. Officer

Rand asked the occupants to step out of the automobile. After the men were out of the car and after officer Rand was joined by officer Bissell and Captain Crabtree, he asked Alcala if he could search the car. According to officer Rand's testimony, Alcala replied "Sure, go ahead." Gonzales also testified that Alcala had given permission for the search and had actually aided the officers. Officer Rand and Captain Crabtree searched the Ford. Wadded up under the left rear seat they found three checks. Each of the checks was "protectorized" in the amount of \$67.34, each was signed with the name of Kehoe as maker, and each was a Speedway Car Wash check. One was payable to Robert Gomez and two were payable to Jino Anthony.

Later, pursuant to a search warrant, the Renault at the Moonlite Shopping Center and defendant's Oldsmobile in Sunnyvale were searched. Two checks were found in the Renault and the check protector and several blank checks were found in the Oldsmobile, along with a number of traffic citations naming defendant. A criminologist testified that in his opinion the writing on the Speedway Car Wash checks was the writing of defendant.

Search of the Ford

At the time that officer Rand and Captain Crabtree searched the Ford automobile and discovered the three completed checks, there was a total of three police officers and three police vehicles on the highway near the stopped automobile. The occupants were asked to

step out of the car and at one point Gonzales was told to stand by the car; at another time Alcala was told to back away from the area of the search. Gonzales was also given a citation for the missing lights and for his failure to produce a driver's license. According to Gonzales' testimony, the police cars did not have the passengers hemmed in. No one was under arrest at the time of the search and none of the individuals had been advised as to any constitutional rights. After testimony was taken in chambers on the constitutionality of the search, the court ruled that there had been consent to the search and the motion of defense counsel to suppress the evidence was denied.

Defendant, relying on *Parrish v. Civil Service Commission*, 66 Cal.2d 260,¹ now contends that Alcala's consent to the search was obtained in a coercive atmosphere, that the consent was therefore involuntary and the subsequent search consequently illegal. Although we agree with defendant that it is inconsequential that the search involved Alcala's constitutional rights rather than the rights of defendant (see *People v. Perez*, 62 Cal.2d 769, 775-776), we conclude that his basic argument is without merit. As the court stated in *People v. Michael*, 45 Cal.2d 751, 753: "Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all

¹This case stands for the proposition that consent obtained by "covert threats of official sanction or by implied assertions of superior authority" is not voluntary consent. (P. 268.)

the circumstances." (See also *Castaneda v. Superior Court*, 59 Cal.2d 439, 442.) In the instant case the prosecution met the necessary burden of showing consent (see *Castaneda v. Superior Court*, *supra*, at p. 444) since there were clearly circumstances from which the trial court could ascertain that consent had been freely given without coercion or submission to authority. Not only officer Rand, but Gonzales, the driver of the automobile, testified that Alcala's assent to the search of his brother's automobile was freely, even casually given. At the time of the request to search the automobile the atmosphere, according to Rand, was "congenial" and there had been no discussion of any crime. As noted, Gonzales said Alcala even attempted to aid in the search.

Defendant also argues that there could be no voluntary consent to the search without prior advice to Alcala that he had a legal right to refuse permission to search the car. Defendant particularly relies on the federal cases of *United States v. Blalock* (E.D. Pa. 1966) 255 F.Supp. 268 and *United States v. Nikrasch*, 367 F.2d 740 which stand for the proposition that subjects of investigation should be advised of their rights to insist on a search warrant. This rule as it applies in the federal courts has not been adopted as the governing rule by the courts in California. As we stated in *People v. Linke*, 265 A.C.A. 322, 340: "the courts have rejected the argument that consent will be ineffective in the absence of a warning to the person addressed of his rights under the Fourth Amendment." (See *People v. Davis*, 265 A.C.A. 367,

374; *People v. Cirilli*, 265 A.C.A. 685, 688; *People v. Slade*, 264 A.C.A. 227, 229; *People v. MacIntosh*, 264 A.C.A. 834, 838-839; *People v. Richardson*, 258 Cal. App.2d 23, 31; *People v. Dahlke*, 257 Cal.App.2d 82, 87; *People v. Campuzano*, 254 Cal.App.2d 52, 57; *People v. Chaddock*, 249 Cal.App.2d 483, 485; *People v. Roberts*, 246 Cal.App.2d 715, 729.) The basic premise behind the California rule was stated in *People v. MacIntosh*, *supra*, at page 838: "When permission is sought from a person of ordinary intelligence the very fact that consent is given . . . carries the implication that the alternative of a refusal existed."²

Search of the Oldsmobile

At the trial of the case, defense counsel moved to suppress the evidence (including the check protector) taken from defendant's 1956 Oldsmobile on the ground that the affidavit supporting the search warrant was insufficient. The motion was denied and the evidence was admitted. Defendant contends that it was error for the trial court to deny this motion since the affidavit did not provide probable cause for the issuance of the

²In *People v. Henry*, 65 Cal.2d 842 the Supreme Court stated "it is unnecessary to consider whether valid consent can be found in the absence of proof that defendant was advised of his constitutional rights pertaining to searches" (at p. 846) and it has been suggested that this language indicates that the Supreme Court considers the question an open one. (See *People v. Griffin*, 250 Cal.App.2d 545, 550, fn. 4.) However, in *People v. Campuzano*, *supra*, 254 Cal.App.2d 52, Justice Kingsley entered a dissent at page 58 on the ground that defendant should have been warned of his Fourth Amendment rights. But as was pointed out in *People v. Dahlke*, *supra*, 257 Cal.App.2d 82 at page 87, the Supreme Court nonetheless denied a hearing in *Campuzano*.

search warrant. The affidavit³ in question was signed by officer John Tomac and essentially stated as follows: that the officer had been charged with the investigation of the subject burglary of Speedway Auto Wash and had probable and reasonable cause to believe that a Paymaster Check Protector, Speedway Auto Wash checks and Speedway Auto Wash wash tickets were located in an Oldsmobile and a Renault

³The affidavit in its entirety reads as follows:

"Personally appeared before me this 31st day of January, 1967, John Tomac, who, on oath, makes complaint, and deposes and says that there is just, probable and reasonable cause to believe, and that he does believe, that there is now located in a 1956 Oldsmobile, license #CGN 877 located at 622 North Bayview Avenue, Sunnyvale, California, and a 1960 Renault, license #SCN 462 located at 2780 El Camino Real, Santa Clara, California, personal property described as follows:

1. A Paymaster Check Protector;
2. Speedway Auto Wash checks;
3. Speedway Auto Wash wash tickets.

"That your affiant has been a police officer for 10 years and in charge of the Mountain View Police Department Detective Bureau for 5 years. Affiant has been investigating a burglary of Speedway Auto Wash, 343 El Camino Real, Mountain View, California, which occurred the night of January 18-19, 1967.

"That your affiant has been informed that the Sunnyvale Police Department stopped a car at 2 a.m. on January 31, 1967, which car contained 6 people and in which car were found 3 Speedway Auto Wash checks which had been taken in the above described burglary; that your affiant has seen those checks and was informed by Arthur Gonzales, one of the said 6 persons in that vehicle, that the check protector taken in the above described burglary and some of the above described Speedway Auto Wash checks are located in the above described Oldsmobile, and that some Speedway Auto Wash checks are located in the above described Renault automobile.

"That your affiant has been told by Detective Ronald McMaster that he (McMaster) looked into the above described Renault and was able to see Speedway Auto Wash checks inside said vehicle.

"Affiant believes the information furnished by said Arthur Gonzales to be reliable and affiant believes said stolen property will be located where first above described.

"That based upon the above facts, your affiant prays that a Search Warrant be issued with respect to the above location for the seizure of said property, and that the same be held under Calif. P. C. Sec. 1536 and disposed of according to law."

automobile which he particularly described; that he had been informed of the incident involving the stopping of the Ford automobile on January 31, 1967, and that he had seen the three checks found therein; that he was informed by Gonzales, one of the six persons in the Ford vehicle, that the above-described check protector taken in the above-described burglary and some of the above-described checks were located in the said Oldsmobile, and that some of said checks were located in said Renault; that affiant was told by Detective Ronald McMaster that McMaster had looked into the said Renault and was able to see Speedway Auto Wash checks inside said vehicle; and that the affiant believed that the information furnished by Gonzales was reliable.

Defendant's chief argument is that the statement of the informer Gonzales was only conclusionary as to what would be found in the Oldsmobile and indicated no personal knowledge on the part of the informer. Accordingly, he asserts that the affidavit is insufficient because it fails to show a factual basis on which the magistrate could conclude that the informant was reliable, and because it also fails to indicate the factual basis of the informant's information.

The applicable rule as declared in *Aguilar v. Texas*, 378 U.S. 108, 114, requires that although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and

some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable.⁴ (See *People v. West*, 237 Cal.App.2d 801, 805.) In *West*, Justice Fleming notes that "*Aguilar* makes clear that a petition for a search warrant based solely on information from a reliable informant must set forth sufficient data in the supporting affidavit (1) to show that the informant is in fact reliable, and (2) to disclose the source of the informant's knowledge so that the examining magistrate can himself determine whether probable cause exists for the issue of the warrant." (P. 805; see also *Spinelli v. United States*, 37 U.S.L. Week, 4110, 4111.)

In the instant case the affiant set forth underlying circumstances which enabled the magistrate to independently judge the validity of the informant's conclusion that the check protector and some of the Speedway Car Wash checks were located in the Oldsmobile. These underlying circumstances are found in the fact that informant Gonzales was a passenger in the Ford at the time three completed Speedway Car Wash checks were discovered in the back seat. The fact of his presence was a sufficient ground for the magistrate to infer that Gonzales knew the source of the checks, the location of the check protector and the location of additional similar checks.

⁴Decisions of the United States Supreme Court interpreting the Fourth Amendment apply to California procedure by virtue of the Fourteenth Amendment. (*Mapp v. Ohio*, 367 U.S. 643; *People v. West*, 237 Cal.App.2d 801, 804.)

The instant affidavit also discloses that the informant was credible and that his information was reliable. Although this reliability is not based on past experience with the informant, it is shown by substantial corroborative facts known or discovered. (See *People v. Cedeno*, 218 Cal.App.2d 213, 220; *People v. Gallegos*, 62 Cal.2d 176, 179.) In addition to the circumstance that Gonzales was a passenger in the Ford where three of the stolen checks had been found, this corroboration is supplied by the fact that Detective McMasters was able to see similar checks when he looked into the Renault automobile described in the affidavit and in which Gonzales had stated such checks were located.

Comment on Defendant's Silence

At the trial during the questioning of officer McMaster the following testimony was elicited by the district attorney: "Officer, prior to questioning Mr. Bustamonte, was he advised by you or someone in your presence of his rights? A. Yes, he was. Q. And who advised him of his rights? A. Detective Peck. Q. Was it done in your presence? A. Yes, it was. Q. And of what rights was he advised? A. He was advised of his right to counsel, right to remain silent, the fact that anything he did say to us could be used against him in court and would be used against him, and the fact that, if he could not afford counsel, one would be appointed to him. Q. Was he questioned as to whether he desired to waive those rights? A. Yes, he was. Q. And what did he say if anything? A. He stated that he didn't care to say anything." Following

this testimony a discussion was had between court and counsel out of the jury's hearing during which the prosecutor stated that he was surprised by McMaster's answer that defendant stated "he didn't care to say anything," and that he had expected the answer to be that defendant had stated he waived the rights specified in McMaster's admonition. Thereupon the trial court advised the jury that it was striking from the record this series of questions and answers concerning McMaster's admonition to defendant as to his rights, and the jury was instructed that they were "to disregard that series of questions." Thereafter, the trial court instructed the jury in its regular instructions that if an accused in police custody declined to answer questions put to him by the police, such fact was not to be considered by them as an inference of either his guilt or innocence.

Defendant's counsel moved for a mistrial on the ground that the subject testimony was a prejudicial, unconstitutional comment on defendant's silence. The trial court denied the motion and defendant now argues that the trial court erred in denying his motion because the error was such that it could not be cured by the admonishing instructions. This contention, in essence, is to the effect that the trial court committed error of the type condemned in *Griffin v. California*, 380 U.S. 609. *Griffin* forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. (P. 615.)

In the instant case the testimony elicited from officer McMaster was in effect a "comment" by the prosecutor

on the accused's silence. (See *People v. Haston*, 69 A.C. 237, 259-260.) However, the comment was not allowed to stand but was specifically stricken from the record. Accordingly, it was removed from the jury's consideration and was not before it. (See *People v. Medina*, 265 A.C.A. 794, 799.) Moreover, the jury was specifically instructed to disregard the testimony which produced the comment. In addition, the trial court instructed the jury that if the accused declined to answer questions put to him by the police, such fact was not to be considered as evidence of guilt. We conclude, therefore, that the court's ruling and its admonitions obviated the claimed error.

Even if we were to assume that the error could not be cured by the admonishing instructions, it cannot be said that the error resulted in a miscarriage of justice which would require a reversal of the judgment. In view of the overwhelming evidence against defendant, there is no reasonable possibility that a different verdict would have been reached had the subject testimony not been given. Accordingly, we are able to declare a belief that it was harmless error beyond a reasonable doubt. (*Chapman v. California*, 386 U.S. 18, 24.)

The judgment is affirmed.

Molinari, P.J.

We concur:

Sims, J.

Elkington, J.

Filed Mar. 14, 1969,

Lawrence R. Elkington, Clerk.

Appendix E**EXCERPTS FROM REPORTER'S TRANSCRIPT**

In the Superior Court of the State of California
In and For the County of Santa Clara
Department No. 5
Before Honorable Peter Anello, Judge, and a Jury.

People of the State of California,	} No. 42,977
Plaintiff,	
vs.	
Robert Clyde Bustamonte,	
Defendant.	

San Jose, California, April 5, 1967, 1:52 o'clock p.m.
Appearances:

For the Plaintiff:

Leo Himmelsbach, Esq.,
Deputy District Attorney,
190 West Hedding Street,
San Jose, California.

For the Defendant:

Taketusugu Takei, Esq.,
Deputy Public Defender,
425 West Hedding Street,
San Jose, California.

Rep. Tr. p. 9, lines 11-19:

The Court: Okay. Let me ask you, are there any constitutional problems that you anticipate arising in this case?

Mr. Takei: Well, I don't know whether you call—well, constitution in a sense. There is a question of the initial stop. There was a stop of a vehicle.

The Court: You mean, search and seizure?

Mr. Takei: Yes; and I think there might be some problem as to the question of the corroboration.

Rep. Tr. p. 75, line 10 to p. 84, line 26:

James Robert Rand,

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: You may take the stand, please, sir. Would you state your name and address for the record, sir.

The Witness: James Robert Rand, Sunnyvale Department of Public Safety, Sunnyvale.

Direct Examination

By Mr. Himmelsbach:

Q. You were so employed on the 31st of January, 1967?

A. Yes, sir, I was.

Q. Approximately 2:40 a.m. of that date, was your attention directed to a vehicle?

A. Yes, sir, it was.

Q. Now, at the time you were on what we might call routine police patrol?

A. Yes, sir.

Q. And operating a police vehicle?

A. Yes.

Q. Were any other officers with you at that time?

A. No.

Q. All right. Then, where was this vehicle when you first observed it?

A. It was proceeding eastbound on El Camino Real in approximately the area of Highway 9.

Q. Where were you relative to this vehicle?

A. I was westbound.

Q. So, it would be an on-coming vehicle, is that correct?

A. Yes.

Q. And what, if anything, attracted your attention to this vehicle?

A. The fact that there was a headlight out.

Q. And what did you do upon observing the condition of the headlights of this vehicle?

A. I made a U-turn at Highway 9 and El Camino, proceeded after the vehicle and noticed that there was also license plate light was out.

Q. License plate, the light was out. So, observing these two alleged equipment defects, what did you do, if anything?

A. Approximately at Wolf and El Camino I stopped the vehicle.

Q. And how many persons were in that vehicle?

A. Six.

Q. What type of a vehicle was this?

A. A 1958 Ford black four-door.

Q. And six people in the vehicle. Could you describe them as to male, female?

A. Six male occupants.

Q. Six male occupants. And how many in each seat of the vehicle?

A. Three in front and three in the back.

Q. Did you, upon stopping the vehicle, did you approach the driver of the vehicle?

A. Yes, sir, I did.

Q. And did you question him as to his identity?

A. Yes.

Q. And did he identify himself?

A. By word only.

Q. By what?

A. By word only.

Q. By word only. What did he tell you his name was?

A. Arthur Gonzales.

Q. All right, And do you recognize the defendant in court?

A. Yes, sir.

Q. And was he a passenger? Was he an occupant of this vehicle?

A. Yes, sir.

Q. And at the time you stopped the vehicle, where was Mr. Bustamonte in the vehicle?

A. He was in the right-hand front seat.

Q. The right-hand front seat, all right. Initially on stopping the vehicle then, did you—you did question the driver, is that correct?

A. Yes.

Q. And is it your usual, uniform practice in a case of stopping a vehicle, to ask for a driver's license?

A. Yes.

Q. Did you ask the driver of the vehicle for a license?

A. Yes, I did.

Q. And was he able to produce the license?

A. No.

Q. And did he indicate to you where his license was or whether he had a license?

A. He stated he didn't have it with him.

Q. He didn't have it with him, all right. Did you question any of the other occupants at this time?

A. Yes, I did.

Q. And who did you question?

A. I asked the other occupants in the vehicle if they had any other identification.

Q. Was this a general question put to the group or did you at this time individually ask a particular occupant or occupants of the vehicle?

A. This was general at this time.

Q. All right. And did you get a response from any of the occupants?

A. Yes, sir.

Q. And what response did you get?

A. The subject sitting in the middle of the front seat produced his driver's license. The other four subjects had no identification.

Q. Now, the subject sitting in the middle of the front seat, he produced his driver's license?

A. Yes, sir.

Q. And what was the name on that driver's license?

A. Alcala.

Q. Do you recall the first name?

A. No, sir, I don't.

Q. Did you make a report on this?

A. Yes, sir.

Q. Did your report include the name of the individuals?

A. I believe so.

The Court: Excuse me, Officer. What time of the evening was this?

The Witness: Just approximately 2:45 in the morning.

Q. So, a person by the name of Alcala produced a driver's license?

A. Yes, sir.

Q. And he would be the person in the middle of the front seat?

A. Yes, sir.

Q. Did any of the other occupants make any statement as to whether they had identification or not?

A. Yes, sir, the—not that they had any identification, no.

Q. Well, did they remain—You indicated previously your question was to the occupants, someone have—generally to the effect that someone in the vehicle have identification. You say Mr. Alcala produced a driver's license?

A. Yes, sir. Well, the defendant said he knew me. As I looked at him, I knew that I had known the subject.

Q. You knew him by sight as someone you had seen before, is that correct?

A. Yes.

Q. Did you know his name?

A. Yes, I believe at that time I did.

Q. Did you ask him for any identification?

A. Yes.

Q. And what did he tell you?

A. He didn't have any.

Q. He didn't have any identification. And did you ask the occupants of the back seat for identification?

A. Yes, sir.

Q. What response did you get?

A. They didn't have any.

Q. They had no identification. Now, just observing this driver who identified himself as Arthur Gonzales, did you—will you tell us about approximately how old he appeared to be to you at the time?

A. Teenager.

Q. Teenager?

A. Yes.

Q. All right. And Mr. Alcala, would you—get any impression of his approximate age at the time?

A. Twenty.

Q. Approximately twenty years old. How about the occupants of the back seat? Would you describe those three males?

A. Appeared to be much older than the three occupants of the front seat.

Q. Well, you say, "much older." How old did they appear to you to be at the time you formed an impression?

A. Thirty on up, thirty, forty, fifty.

Q. You're saying—

A. Excuse me. Go ahead.

Q. Well, how old did the oldest one appear to be to you?

A. About forty-five.

Q. All right. Now, did you at this time, at the time you had asked these questions about identification, were any other officers present?

A. Yes, Officer Bissell arrived on the scene shortly after the car stopped.

Q. Had you requested his appearance?

A. This is standard procedure, during car stops between dusk and dawn, you go on the radio and say you're making a car stop at this location, such and such license number, and the nearest unit to that location will automatically fill in.

Q. What they call a fill in, is that correct?

A. Yes.

Q. All right. Did any of them produce any identification then other than this Mr. Alcala?

A. No.

Q. All right. Did you make any effort to ascertain who was the—who was the owner or the person entitled to possession of the car at that time?

A. This was volunteered.

Q. Pardon?

A. This was volunteered.

Q. By whom?

A. By the driver and the subject Alcala.

Q. All right. And the driver is this person who identified himself as Arthur Gonzales, is that correct?

A. Yes.

Q. And what did the driver tell you?

A. That it was his brother's car, gesturing to the Alcala subject.

Q. Did you question Mr. Alcala then?

A. Yes, I did.

Q. And what did he tell you with regard to—

Mr. Takei: Your Honor, I object to any statements made by a party not present in court as hearsay.

Mr. Himmelsbach: Your Honor, this is being offered as reasonable cause for a subsequent search which will be developing in the next few minutes, and I think hearsay would be admissible.

The Court: Yes.

Mr. Himmelsbach: Strictly for the purpose.

The Court: Objection will be overruled.

Q. What did Mr. Alcala tell you?

A. He stated it was his brother's car.

Q. Now, Officer Bissell had arrived. Did any other officer or officers arrive at or about this time?

A. Not at that time.

Q. What next was done regarding the occupants of the vehicle?

A. The— Asked the occupants to step out of the vehicle. We talked to the occupants trying to determine what the situation was at that time.

Q. All right. And did you question—whom did you question in this regard?

A. We started with the—I talked to the subjects in the back seat asking them who they were, where they were from, et cetera.

Q. Did they give you their name?

A. Yes.

Q. And did you question any of them as to what they were doing in the car or where they were going?

A. Yes, sir.

Q. And specifically, did any particular individual give you an answer?

A. Yes, as to where they were going.

Q. All right. Who was that person, do you know, or did he identify himself by name?

A. I believe that would be Jino Anthony.

Q. All right.

A. And Otis Bruce, the two subjects that were in the back seat.

Q. They were two of the subjects that were in the back seat?

A. Yes.

Q. And who was the third subject, at least, how did he identify himself?

A. Rohrer.

Q. Rohrer?

A. Yes.

Q. That would be Richard Rohrer?

A. Yes.

Q. R-o-h-r-e-r?

A. Yes.

Q. Did either of these individuals indicate what they were doing in the car and where they were going?

A. They were going to San Jose.

Q. Who told you this?

A. This was subject Rohrer and was confirmed by the other two occupants.

Q. Going to San Jose? Did they indicate what they were doing in the car, that is—not where they were going, but how they happened to be in the car?

A. They were picked up by the three occupants in the front seat.

Q. When and where or did you ask?

A. May I refer to my notes?

Mr. Takei: Excuse me, Your Honor. I don't see how this can be admissible as hearsay to establish probable cause. I don't see any relationship at this time.

Mr. Himmelsbach: Your Honor, I might indicate to the Court, attempting to develop suspicious circumstances surrounding the stop of this car, the disparity of the ages, the hour of the night, and I intend to develop that there were conflicting stories given by the occupants of the back seat as to where they'd come from, where they were going, and whether they knew each other. They completely—

The Court: Approach the bench, please.

(Sotto-voce discussion between Court and counsel at the Bench.)

The Court: Ladies and gentlemen of the jury, we're going to take a recess at this time because we have one of those problems that I referred to the other day, namely, it's a legal question involved that necessarily has to be discussed outside the presence of the jury, and counsel have indicated that perhaps it may take some time.

Rep. Tr. p. 86, line 3 to p. 109, line 11:

(Pursuant to recess, court convened in chambers out of the presence of the jurors, and the following proceedings were had:)

The Court: All right, let the record show we are in chambers. The defendant is present with his counsel.

You may proceed.

Mr. Himmelsbach: Thank you.

James Robert Rand,

the witness on the stand at the time of the recess, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Himmelsbach:

Q. Officer Rand, you understand you are still under oath even though we are testifying in chambers?

A. Yes.

Q. All right. Officer, after you stopped the car and had some discussion with the passengers in the car, did you leave all these people in the car? Did you have them get out of the car? What occurred?

A. At this time they stepped out of the car. We had conversations with them individually.

Q. And that would be—you say individually. One at a time where they were separated or in groups?

A. Right, right.

Q. All right. And, during the conversation, did you or any other police officer in your presence ask the permission or any person's permission to search the automobile?

A. Yes, we did.

Q. What was done in this regard?

A. I asked subject Alcala if we could look through the car.

Q. And why did you select subject Alcala?

A. Because he was the one most directly related to the automobile.

Q. In what way?

A. Because it was his brother's car.

Q. What was the basis of your information that it was the brother's car?

A. His statement.

Q. Had you checked the registration or anything at that time?

A. No.

Q. Incidentally, did you write a citation to Mr. Gonzales, the driver of the vehicle—did you write a traffic citation?

A. Yes, I did.

Q. To Mr. Gonzales?

A. Yes.

Q. You cited him for what violation?

A. Headlight out, taillight out and no license in possession.

Q. When you questioned Mr. Alcalá regarding permission to search the car, where was Mr. Alcalá?

A. He was standing outside the car.

Q. Outside of what car?

A. Outside of his car, outside the Ford.

Q. Was anyone else in the immediate presence, either other officers or any of the parties?

A. Several of the parties were present, Captain Crabtree, Officer Bissell. I believe that Mr. Gonzales was in the immediate vicinity, also.

Q. How about Mr. Bustamonte?

A. Should have been. They were all standing, close proximity to each other.

Q. And you asked Mr. Alcalá if you could search the car, and did he give any reply to this?

A. Said, Sure, go ahead."

Q. As best you can recall, were those his exact words?

A. Close as I can recall, more like an offhand statement like, you know, "Go ahead. Help yourself."

Q. What did you do at that time?

A. At this time Captain Crabtree and myself started to make a thorough search of the car.

Q. And during the search of the car, was anything discovered——

Mr. Takei: Excuse me.

Q. ——in there on—in your presence——

Mr. Takei: Excuse me. Before we go further as to the actual search, I'd like to voir dire the officer further on the question of consent.

The Court: All right, you may.

Voir Dire Examination

By Mr. Takei:

Q. Officer Rand, when you asked Mr. Alcala permission to search the car, do you recall the words that you used?

A. Gee, I can't, you know, give you the exact wording used. The effect was, "Can we search the car."

Q. Now, did anybody else ask Mr. Alcala prior to your asking him? Do you know whether any other officer——

A. I don't know, no, I don't know.

Q. Did you ask him more than once or just once?

A. Don't recall.

Q. Now, you stated at that time he was outside of the car, is that correct?

A. Right.

Q. And they were standing around. Were they under arrest at that time?

A. No.

Q. This is more in the— What was the purpose of the search of the vehicle?

A. Well, the fact at the time and the—had no identification and that the three subjects in the front seat were somewhat younger than the three guys in the back seat, they didn't seem to have anything in common together, you know. If it was six teenagers, you know, you'd see they were all pretty much the same age; and then the conflicting stories of who picked up who and they were going where, you know, was all—didn't fit in right.

Q. You said they told you they were going to San Jose, is that correct?

A. Right.

Q. And that—strike that.

Now, when you asked Mr. Alcala permission to use his car, you say he was not under arrest at that time?

A. No.

Q. To search his car?

A. No.

Q. Was anybody under arrest at that time?

A. No, not to my knowledge.

Q. Did you have a search warrant at that time?

A. No.

Q. Now, when you asked Mr. Alcala his permission to search the car, did you advise him that he didn't have to agree to permit you to search the vehicle?

A. I don't believe so.

Q. Now, prior to this, I believe you had—they were outside of the vehicle. Did they get out voluntarily or did you tell them to get out?

A. First one that got out of the car was Mr. Rohrer sitting on the back seat, and we talked to him. Then, the others, as we talked to them, got out of the car.

Q. Did they get out at your request?

A. Not at my specific request 'cause Officer Bissell was there, too.

Q. Well, was it——

A. I believe it was.

Q. ——at the request of other officers?

A. Right.

Q. But, you had not advised them that they were under arrest?

A. No.

Q. How many officers were present at that time beside Officer Bissell?

A. Well, we called for Captain Crabtree to come over, and he came down. And he subsequently called for two more units, I believe Officer Sheehy was one, and I can't recall right offhand who the other officer was.

Q. This would seem like it would be about five vehicles there?

A. About four police cars.

Q. Four police cars?

A. During the whole time we were there.

Q. This was before the commencement of the search?

A. Yes three.

Q. Three?

A. Yes.

Q. Yourself, Officer Bissell and——

A. Captain Crabtree.

Q. Crabtree?

A. Yes.

Q. This is prior to the search?

A. Right.

Q. And after the search, the other cars came?

A. Right, to my best recollection.

Q. Was there anybody else around at the time besides the car that you stopped and the police officers?

A. Not that I recall.

Q. Were they at this time, the car they were riding, was this pulled over to the side or parking lot or what?

A. Pulled over to the side of the road.

Q. After you initially stopped them, did you ask them to move the car some place?

A. No.

Q. The car remained there?

A. That's right.

Q. From there they got out of the car and——

The Court: Excuse me. Would you make your answer audible?

A. Oh, yes, excuse me.

Mr. Takei: I have no further questions.

Direct Examination (Resumed)

By Mr. Himmelsbach:

Q. Prior to making a search of the car, had you threatened to arrest anybody?

A. No, this was all very congenial at this time.

Q. What do you mean "confusing" at this time?

A. Congenial.

Q. I'm sorry. Had you questioned anybody regarding any specific crime or crimes other than the circumstances surrounding the citation itself, the vehicle?

A. No.

Mr. Himmelsbach: No further questions of this witness, Your Honor.

The Court: You don't intend to go into the search?

Mr. Himmelsbach: I think, perhaps, I'd put on another witness, Your Honor, at this time, and then—well, I could go into the search.

The Court: I thought you were going to, but for his request to voire dire the witness further.

Mr. Himmelsbach: Might have asked this question.

Q. (By Mr. Himmelsbach) Officer, subsequent to your conversation with Mr. Alcala, did you search the vehicle?

A. Yes.

Q. And did you find anything unusual?

A. Yes.

Mr. Takei: Well, Your Honor, for the record, I'd like to make an objection to the admission of any of the officer's statements to what he found in the car and the admission of any evidence that he found in the car on the ground that this was an improper

search. The officer had no people—not under arrest at that time. There was no search warrant. The officer states that he had the consent of Mr. Alcala, but the circumstances would seem to indicate at the time that the search was made by the officer, that it would not—the consent of Alcala was—I don't believe could truly be said voluntary consent. Would be more of a coercive consent, coercive in the officers—for one thing, the number of officers being present there and the police vehicles. They'd been told to get out of the car. They'd been requested, or somebody had to get out of the car.

They weren't advised that they could refuse to consent to the search of the car. I think, under the—viewing the entire circumstances factually, would seem to be not a voluntary consent but in the nature of police officers using their authority to, because they are police officers, and having citizens submit under those circumstances.

Mr. Himmelsbach: At this time, Your Honor, I would like to cite to the Court a couple of cases, one is *People versus Guyette*, 231 Cal. 2d at Page 460, where the appeal was based on a question of whether there was consent. In this case, basically, the defendant, along with two female accomplices, were arrested near a hotel on a search of passing forged checks. In questioning of one of the female accomplices, she told the police that there was a shotgun in her room which was jointly occupied by the females and defendant.

The police told her they would have to get a key to that room. The woman accomplice by the name of Mrs. Hagquist removed the key to the room from her

waistband without any particular comment, tossed it on the table. The court went on to hold that this was, in fact, her consent to search.

I think she testified at the trial, well, she hadn't really consented. She was a woman. She was surrounded by the police officers. But, to quote the court, they said such a gesture would lead a reasonable person under the circumstances to conclude that she consented that he should use the key, enter the room and conduct the search.

And further language of the court, I don't have the page, but it says, because, "It was the duty of the court to determine what Mrs. Hagquist appeared to do from her actions rather than from what she secretly thought. It was the objective, and not the subjective, occurrence that gave or denied the police consent to proceed."

And I think the cases in the area of consent, is held when—that it is objective, if it would appear to the officer that this person has genuinely consented to search, then the search is there. The officer can't judge what subjectively might be in the defendant's mind.

Subjectively, the defendant might, for example, say, well, I think there's something in the car, but they're not going to find it on this kind of a search, or if they find it, they can't tie it in to me, or, if—well, if I tell them, "No," they'll get more suspicious and figure out another way to make the search. And I think the Guyette case holds that it's the objective test that must be used.

At this stage in this particular case we have really no evidence now other than the testimony of the officer that there was consent.

The Court: Yes, that's what the Court had in mind, that there, being no other evidence at this particular point, the Court has no choice but to find that there was consent based upon the evidence thus far produced.

The Clerk: Your Honor, what's the citation, 231 Cal.2d?

The Court: That's what he said.

Mr. Himmelsbach: 231 Cal. App. 2d.

I would like at this time, however, Your Honor, to call another witness.

The Court: All right, you may do so.

Mr. Himmelsbach: Of the record on this case, at least.

The Court: You may do so.

Mr. Himmelsbach: Will you ask Mr. Joseph Gonzales to step in. He's the young man waiting out in the hall. I guess I should have Officer Rand leave at this time since they will be testifying about the same matter.

The Court: All right, would you mind stepping out for awhile.

(Witness Temporarily Excused.)

Mr. Takei: Your Honor, before we go into Gonzales, the formal ruling on my motion would be to deny it, is that correct, at this time?

The Court: What was your motion?

Mr. Takei: My motion was—I was objecting to the admission of any testimony of the officer.

The Court: The motion will be denied on the ground that the Court finds that, based on the evid-

ence thus far, that there was consent to search the automobile, yes.

The Clerk: Excuse me, if Your Honor please. There was another part to his motion, any evidence seized as a result——

Mr. Takei: Yes.

The Court: Yes. Well, we haven't come to that yet.

Mr. Himmelsbach: Mr. Gonzales, would you stand and raise your right hand. The clerk will swear you in.

Joe Gonzales,

called as a witness on behalf of the People, being first duly sworn, was examined and testified as follows:

The Clerk: Would you please state your name and address for the record.

The Witness: My name is Joe Gonzales. I live 579 Farley Street, Mountain View.

Direct Examination

By Mr. Himmelsbach:

Q. Now, Mr. Gonzales, I want you to——

The Clerk: Could we get the spelling of his last name.

The Witness: G-o-n-z-a-l-e-s.

Q. (By Mr. Himmelsbach) I want you to understand that you've just been sworn as a witness in a jury trial, and the fact that we are now in chambers with the Judge and the defendant and the other court personnel doesn't change the fact that you are a witness under oath in this trial. You understand that?

A. Yes.

Q. And the fact the jury isn't present has nothing to do with your testimony. You are still testifying under oath.

A. Yes.

Q. In this case, All right. How old are you?

A. Seventeen.

Q. Seventeen years of age. Where are you employed?

A. Fjords Smorgas.

Q. Would you spell that for us?

A. F-j-o-r-d-s.

Q. Directing your attention to the 31st of January, 1967, approximately 2:40 a.m. in the morning, were you the driver of a vehicle?

A. Yes.

Q. And was that vehicle stopped by the police?

A. Yes.

Q. And what police department was that?

A. Sunnyvale.

Q. Sunnyvale Police Department. And about where was the car when it was stopped? Do you know what street you were on?

A. It was on El Camino and Wolf, I think.

Q. El Camino and Wolf Road?

A. Yes.

Q. All right. And after the—Who was in the car at the time it was stopped other than yourself?

A. Well, there was Bustamonte, Alcalá and three other men.

Q. You say "Bustamonte." Sitting to my left is the defendant in this case, Robert Bustamonte.

A. Yes.

Q. That is the person you are referring to?

A. Yes.

Q. And a person by the name of Mr. Alcala?

A. Alcala.

Q. Do you know his first name?

A. Joe.

Q. Joe Alcala. And were there other people in the car?

A. Three other persons.

Q. Do you know who they were?

A. Jino Anthony and—I didn't catch the other two names.

Q. Did you know who they were at the time?

A. No.

Q. When had you first seen them?

A. That night.

Q. That night. All right. The car was stopped, and did a police officer approach you?

A. Well, he was approaching me and I walked out.

Q. You walked out, is that correct?

A. I walked out.

Q. Did he question you about anything about the way you were driving or the condition of the car?

A. Well, he was telling me about my high beams, they were on. I had my high beams on.

Q. And was there anything wrong with your headlights, by the way?

A. Yes, I think the left one wouldn't go on or—

Q. The left one wouldn't go on. Did he ask you if you had a driver's license?

A. He asked me, but I didn't have any.

Q. But you didn't have a driver's license?

A. No.

Q. Now, subsequent to this time, did the officer question the other people, ask any question of the other people that were in the car?

A. Yeah, he told me to stand by the car, then he went over there to the car.

Q. All right. Now, did—Whose car was this?

A. It was Pete Alcala.

Q. Peter, Peter Alcala?

A. Yes.

Q. Who is Peter Alcala?

A. That's Joe Alcala's brother.

Q. How did you happen to be driving when the car was stopped? Did Peter give it to you or who had given you permission to drive the car?

A. Joe did, Joe Alcala. He was tired, see, and I told him I wanted to drive.

Q. All right. And was—Did you hear anybody question as to who owned the car?

A. Well, no, I just—

Q. All right. Did you—Were you present—Did you hear anyone question with regard to searching the car?

A. Yeah, me and Joe Alcala were outside when Sunnyvale policeman asked Joe if he could search the car.

Q. Do you remember what words the Sunnyvale policeman used to the best of your recollection?

A. Oh, just, "Mind if I search your car?"

Q. And could you hear what Joe said, if anything?

A. Joe said, "Go right ahead."

Q. "Go right ahead," was that his words? Where was Mr. Bustamonte at the time Mr. Alcala said "Go right ahead"?

A. I'm not so sure if he was outside with us or inside a police car in the back seat.

Q. All right. It was cold this night?

A. Yeah, it was cold.

Q. And was anybody placed in the police car by the police?

A. No, me and Robert Bustamonte, we just sat in the back 'cause it was cold.

Q. Why?

A. It was cold.

Q. So, you don't know whether Mr. Bustamonte was close enough to hear this conversation, is that correct?

A. Not that I know.

Q. Assuming, if he was in the car and the window was up——

A. See, the windows, they were up. I don't think he could have heard it.

Q. He just said, "Go right——"

A. Yes, Joe said, "Go right ahead."

Q. Did Mr. Alcala question him in any way or, "Why do you want to search," or, "Have you got a search warrant?"

A. No. In fact, he even helped him.

Q. He even helped him?

A. Yes, he opened up the glove compartment and back in the trunk.

Q. You saw the officer enter the car then?

A. Yes, there was two of them.

Q. You say, when Mr. Alcala helped, did he actually get in the car or just lean in?

A. He asked him to open up the trunk, so he got the keys and opened up the trunk.

Q. How about the glove compartment, did you see him open——

A. No, actually, they told him to back off, he was standing behind when they were searching it.

Q. They told him to back off?

A. Well, he moved out of the way, see.

Q. All right. But, when they went to search the car, you say he opened the trunk or the glove compartment?

A. Well, see, he was near me and then the police officer asked Joe, he goes, "Does the trunk open?"

And Joe said, "Yes."

He went to the car and got the keys and opened up the trunk.

Q. He opened it for them?

A. Yes.

Mr. Himmelsbach: No further questions of this witness, Your Honor.

Cross Examination

By Mr. Takei:

Q. Mr. Gonzales, when the officer was asking Joe Alcala permission to open the—look into the car or search the car or search the trunk, did you hear all the conversation?

A. Well, I was right next to Joe Alcala.

Q. You were next to Joe Alcala. And do you know or can you recall the words that the officer used when he asked Joe?

A. Like I said, "May I," you know, "search your car?"

Q. Do you know which officer asked that?

A. I think it was—no, no, I don't. I don't know his name.

Q. Did he make any threats to Alcala?

A. Not that I know. I don't think so.

Q. You heard most of the conversation, though, you say?

A. Yes.

Q. All of the conversation?

A. Well, not most of it, see, 'cause he was—'cause the officer that asked him if he could search, he was moving this tool chest in the back, he was lifting it up for him and everything, in the back of the trunk, and I was standing by the police car.

Q. How much did you hear, anyway, all of the conversation, most of the conversation, some of the conversation?

A. Mr. Himmelsbach: I think I'd have to object to the question as calling for the opinion and conclusion of the witness, Your Honor. He can testify what he did here [sic], but I don't think he can testify, give an opinion as to what he did not hear.

The Court: Well, do you want to clarify your question.

Q. Well, Mr. Gonzales, where were you standing when the officer came up and talked to Alcala about searching the car?

A. Right next to the police car.

Q. Was Mr. Joe Alcala next to you?

A. Yes.

Q. Where was he standing?

A. Right next to me, right by the front door. See, we were leaning against the police car, see, the car—the—Joe's car was right here, and there was one behind it and there was a car right over here (indicating), like in this slot type of thing.

Q. What do you mean, "slot type of thing"?

A. A lot, you know, like a driveway.

Q. You were parked on a driveway?

A. No, we were off the street, but there was like this driveway or, like a lot, you know, some type of, you know, pavement.

Q. Well, anyway, you were leaning against the police car at that time?

A. Yes.

Q. Right? With Joe Alcala?

A. Joe Alcala.

Q. Was he standing next to you?

A. Yes, he was standing right next to me. See, after, when the policeman said, "Can I search your car," then he went over there, see.

Q. Do you know whether the officer asked Mr. Alcala whether he owned the car?

A. No, not—Well, see, when they stopped us, Joe told me to tell them that, you know, it's his brother's car, which it is his brother's car.

Q. So, you told the officer that it was Joe's brother's car?

A. Yes, 'cause the officer asked me whose car it was.

Q. And when you were outside and standing up against the car, you heard the officer asking Mr. Alcala about the search?

A. Yeah.

Q. Is that correct?

A. Yes.

Q. And before he asked Mr. Alcala about permission to search the car, did he say anything to Mr. Alcala?

A. No, he just said, "Well, can I search your car?"

Q. Just came up to him and said, "Can I search your car?"

A. Yes.

Q. And he didn't give any reason?

A. No, no reason.

Q. And you said Joe Alcala said, "Sure, go ahead"?

A. Yeah, he said, "Go right ahead."

Q. Were you under arrest at that time?

A. No.

Q. You were leaning against the car?

A. Yeah, 'cause it was cold, you know. Was leaning against something.

Q. Did the officer advise Mr. Alcala that he didn't have to agree to let him search the car?

A. No, he didn't say nothing like that. He just said, well, "Just go right ahead," you know. He didn't have no——

Q. No, no, wait, wait. Listen to my question again. Did you hear the officer advise Mr. Alcala that he didn't have to agree to consent to the search?

A. I didn't hear that, no, didn't hear it.

Q. You didn't hear anything——

A. I didn't hear that, no.

Q. How many police cars were there?

A. Let's see. Only about—there was three Sunnyvale and one supervisor, deputy supervisor.

Q. Four police cars?

A. Yes.

Q. Were they all standing around?

A. Yes, there was two searching the car, and there was one by the radio, you know, one behind us.

Q. Did the police cars have you hemmed in?

A. No, just the police car behind me and there was one behind it, and there was one on the side where we were leaning.

Q. Side of the car that you were riding?

A. Yes.

Q. Was there one in front of the car, too?

A. No.

Mr. Takei: Thank you. I have no further questions.

Mr. Himmelsbach: Nothing further, Your Honor.

The Court: All right.

(Witness Excused.)

The Court: Anything else on this particular point?

Mr. Himmelsbach: No, Your Honor. I would request we proceed in front of the jury.

Mr. Takei: Well, Your Honor, I would object to any testimony of the search of the car on the ground that the police officer failed to advise Mr. Alcala that he could refuse to.

The Court: Do you have any authorities on that particular proposition?

Mr. Takei: Not at this time, Your Honor.

Mr. Himmelsbach: I don't believe——

Mr. Takei: I don't know if there is a case at this time.

The Court: This is the time that the Court is going to have to rule on it.

Mr. Takei: Yes, I understand fully, Your Honor. For the record I'm making the objection.

The Court: All right. Well then, the Court will deny your motion.

Mr. Takei: Thank you, Your Honor.

Mr. Himmelsbach: Thank you.

(Whereupon, court convened in the courtroom in the presence of the jurors and the following proceedings were had:)

The Court: Let the record show the defendant and all counsel and members of the jury are present.

Officer, would you resume the stand, please.

James Robert Rand,

resumed the stand and testified further as follows:

The Court: You may continue your examination.

Mr. Himmelsbach: Thank you, Your Honor.

Direct Examination (Resumed)

By Mr. Himmelsbach:

Q. Officer Rand, you did make a search of this vehicle, is that correct?

A. That's correct.

Q. And you were assisted by some other officer in making the search?

A. Yes, I was.

Q. Who was that?

A. That was Captain Crabtree.

Q. Now, in the course of your search, did you observe something unusual either that you located or that someone else located in your presence?

A. Yes, I did.

Q. And what was that?

A. Those were three checks that were in the vehicle.

Q. And where were those located?

A. They were underneath the back seat folded up or wadded up, as you may, in the left of the rear seat.

Q. In the left of the rear seat. Now, would that be — In order to do this, did you have to lift the seat out?

A. Yes.

Q. Seat was lifted out. And did you pick up the checks yourself from where they were in the vehicle or did you observe them picked up?

A. Captain Crabtree picked it up and unfolded it and showed it to me and I picked up the other two.

Q. Were the three of them together or were they separated underneath the seat?

A. They were separated within an area of six or eight inches apart.

Q. Six or eight inches apart, is that correct? All right, Officer, I'm going to show you People's Exhibit, for identification, 3-A, 3-B and 3-C and ask you to examine each of the exhibits. Have you had an opportunity to examine them?

A. Yes, sir.

Q. And I will ask you if you recognize any or all of those exhibits?

A. Yes, sir.

Q. And where did you first see them?

A. These were the checks that were removed from the vehicle.

Q. These were the three checks taken from under the back seat, is that correct?

A. Yes.

Q. And after they were taken from the back seat, who took the custody and control of them if you know?

A. I did.

Q. And what did you do with the checks?

A. I transported them to the station with the subjects, and I placed them in a plastic bag and turned them over to the officer from Mountain View.

Q. That would be Officer——

A. McFadden.

Q. McFadden from Mountain View Police Department?

A. That's right.

Rep. Tr. p. 328, lines 5-11:

Mr. Himmelsbach: At this time, Your Honor, we'll ask that People's Exhibit 3-A, 3-B and 3-C, which consist of checks Number 2430, 2431 and 2497, be received into evidence.

The Court: Very well, those three exhibits will now be admitted in evidence.

The Clerk: People's Exhibit 3-A, B and C, inclusive, admitted into evidence.

(Whereupon, the above-mentioned items, previously marked People's Exhibit 3-A, 3-B and 3-C for identification, were received in evidence.)

Supreme Court of the United States

No. **71-732** --- ~~October Term~~ **19** ~~71~~

**Marle R. Schmeskloth, Superintendent,
California Conservation Center,**

Petitioner

v.

Robert Clyde Bustamante

ORDER ALLOWING CERTIORARI. Filed **February 28,** -----, **19 72**

The petition herein for a writ of certiorari to the United States Court of Appeals for the **Ninth** ----- Circuit is granted.

DEC 3 1971

R. ROBERT SEAYER, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. **71-732**

MERLE R. SCHNECKLOTH, *Petitioner*

VS.

ROBERT CLYDE BUSTAMONTE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

EVELLE J. YOUNGER,
Attorney General of the State of California,
EDWARD P. O'BRIEN,
Deputy Attorney General,
ROBERT R. GRANUCCI,
Deputy Attorney General,
6000 State Building,
San Francisco, California 94102,
Telephone: (415) 557-1959,
Attorneys for Petitioner.

RESPONSE NOT PREPARED

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1971

No.

MERLE R. SCHNECKLOTH, *Petitioner*

VS.

ROBERT GLYDE BUSTAMONTE, *Respondent*

**PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit**

Petitioner, Merle R. Schneckloth, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 13, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, is appended hereto as "Appendix A." The opinion of the United States District Court for the Northern District of California, also unreported, is

appended hereto as "Appendix B." The opinion of the California Court of Appeal is reported at 270 Cal.App.2d 648, 76 Cal.Rptr. 17.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed September 13, 1971. This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under Title 28, United States Code section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding invalid a search based upon a verbal expression of consent in an atmosphere free from coercion, on the sole ground that the state failed to demonstrate that the consent was given with knowledge that it could be withheld.

2. Whether questions of search and seizure should be available to a state prisoner seeking to set aside a final conviction on federal habeas corpus.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

The District Attorney of Santa Clara County filed an information on February 24, 1967, accusing appellant Robert Clyde Bustamonte of receiving stolen property, in violation of California Penal Code sec-

tion 496, and possessing a complete check with intent to defraud, in violation of California Penal Code section 475(a).

Appellant was arraigned in the Santa Clara County Superior Court and pleaded not guilty on March 3, 1967. Jury trial commenced on April 5, 1967. On April 12, 1967, the jury convicted appellant of possession of a completed check with intent to defraud, but reached no verdict on the charge of possession of stolen property. The trial court thereafter declared a mistrial as to the latter charge. Appellant was sentenced to prison for the term prescribed by law on April 21, 1967.

Appellant filed notice of appeal on April 27, 1967. The judgment of conviction was affirmed by the Court of Appeal of the State of California, First Appellate District, Division One, in an opinion published at 270 Cal.App.2d 648, 76 Cal.Rptr. 17 (1969).

On May 8, 1969, the California Supreme Court denied without opinion appellant's petition for a hearing.

B. Proceedings in the Federal Courts

On May 23, 1969, Bustamonte petitioned the District Court for a writ of habeas corpus. The petition was filed on February 10, 1970. The District Court's order granting appellant's motion to file in forma pauperis and denying his petition was filed on February 10, 1970.

Appellant filed notice of appeal on March 9, 1970. On that date, the District Court certified that there

was probable cause to appeal and granted leave to proceed without prepayment of cost.

On September 13, 1971, the Court of Appeals filed its opinion vacating the order of the District Court denying the writ and remanding the matter for further proceedings.

C. Statement of the Facts

The facts of this case are recited in the opinion of the California Court of Appeal, 270 Cal.App.2d at 650-651, 76 Cal.Rptr. at 18-19:

"On the morning of January 19, 1967, Charles Kehoe, owner of the Speedway Car Wash in Mountain View, discovered that the business office had been burglarized some time since he had closed on the previous day. A check-writing machine, known as a check protector, and a number of blank checks had been removed from the office.

"On January 21, 1967, Joe Gonzales and Joe Alcalá went with defendant to the Food Fair Market in Mountain View. According to the testimony of Gonzales, defendant filled out a check while they were in the parking lot. This check was a Speedway Car Wash check 'protectorized' in the amount of \$63.75 and defendant made it out to a 'Joe Garcia' and signed it with Kehoe's name. Gonzales took the check into the market where he cashed it in the process of buying a carton of cigarettes. Kehoe identified the check payable to Garcia and stated the signature was not his. After cashing the check on January 21, defendant, Gonzales and Alcalá went to defendant's home, Gonzales saw defendant and Alcalá lean over the

open trunk of defendant's parked Oldsmobile automobile and then the two returned to the truck where Gonzales was waiting, bringing with them two additional Speedway Car Wash blank checks. The amounts of money were filled in on the checks but no names or signatures were entered. The men next unsuccessfully attempted to cash another check at the Blue Bonnett Bar in Sunnyvale.

"Gonzales testified that at some time before the incidents of January 21 defendant had shown him the check protector and some blank checks which were contained in the trunk of a Camaro automobile which had been rented by defendant.

"On January 31, 1967, defendant, Alcalá and Gonzales went to San Jose to find persons willing to use false identification for the purpose of cashing checks. At about 11 p.m. they picked up three other men. Attempts to cash checks at grocery stores and a bar were futile. During the evening they stopped at the Moonlite Shopping Center where Gonzales saw defendant take some checks from defendant's Renault automobile which was in the parking lot.

"Police Officer James Rand of the Sunnyvale Department of Public Safety was in a police vehicle alone on routine patrol at approximately 2:40 a.m. on January 31, 1967. He observed an oncoming vehicle which had only one functioning headlight. Rand made a U-turn and also observed that the automobile in question did not have an automobile license plate light. He stopped the automobile which was a black 1958 Ford 4-door sedan. Six men were in the automobile at the time it was stopped, and Rand testified that

defendant was in the front seat along with Alcala, and that Gonzales was driving. After Gonzales failed to produce a driver's license, Officer Rand asked if any of the occupants of the Ford had identification. Only Alcala produced a driver's license and he indicated that the automobile belonged to his brother. Officer Rand asked the occupants to step out of the automobile. After the men were out of the car and after Officer Rand was joined by Officer Bissell and Captain Crabtree, he asked Alcala if he could search the car. According to Officer Rand's testimony, Alcala replied 'Sure, go ahead.' Gonzales also testified that Alcala had given permission for the search and had actually aided the officers. Officer Rand and Captain Crabtree searched the Ford. Wadded up under the left rear seat they found three checks. Each of the checks was 'protectorized' in the amount of \$67.34, each was signed with the name of Kehoe as maker, and each was a Speedway Car Wash check. One was payable to Robert Gomez and two were payable to Jino Anthony.

"Later, pursuant to a search warrant, the Renault at the Moonlite Shopping Center and defendant's Oldsmobile in Sunnyvale were searched. Two checks were found in the Renault and the check protector and several blank checks were found in the Oldsmobile, along with a number of traffic citations naming defendant. A criminologist testified that in his opinion the writing on the Speedway Car Wash checks was the writing of defendant."

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Ninth Circuit is out of harmony with decisions of this Court, the other circuits and the California courts. California courts hold that the determination in a particular case of whether an apparent consent was in fact voluntary is a question of fact to be determined in the light of all the circumstances. They do not require specific affirmative proof that the person searched knew that he had a right to refuse consent. This is a reasonable rule and it has been sanctioned by this Court's decision in *Bumper v. North Carolina*, 391 U.S. 543 (1968). As a constitutionally acceptable standard, California's consent rule must be applied to state prisoners in federal habeas corpus proceedings. *Ker v. California*, 374 U.S. 23 (1963). Only an authoritative decision by this Court can restore harmony within our federal system.

Moreover, this case presents this Court with an opportunity to reconsider its recent decision in *Kaufman v. United States*, 394 U.S. 217 (1969), and to hold that questions of search and seizures are not appropriately raised on collateral attack.

ARGUMENT

I

THE FORD IN WHICH BUSTAMONTE WAS RIDING WAS SEARCHED PURSUANT TO A VALID CONSENT AND THE COURT OF APPEALS ERRED IN HOLDING OTHERWISE

Bustamonte failed to persuade the California trial court, intermediate appellate court and Supreme

Court that the consent to search the car in which he was riding was invalid. He also failed to persuade the United States District Court. However, his persistence was eventually rewarded when he persuaded the Court of Appeals to evaluate his claim of invalid consent in the light of the more rigorous federal standard. See comment, 10 Santa Clara Lawyer, 205, 207 (1969). Previous decisions of the Ninth Circuit overturning state trial and appellate courts on consensual search questions have encouraged such forum shopping expeditions. See, e.g., *Cunningham v. Heinze*, 352 F.2d 1, 3 (9th Cir. 1965); *Oliver v. Amiotte*, 382 F.2d 987 (9th Cir. 1967); *Oliver v. Bowens*, 386 F.2d 688 (9th Cir. 1967). Cf. *State of Montana v. Tomich*, 332 F.2d 987, 990 (9th Cir. 1964).

In applying the exclusionary rule, "the contrast between the federal and California approaches is sharpest in the area of searches by consent." Manwaring, *California and the Fourth Amendment*, 16 Stan.L.Rev. 318, 334-35 (1964). This divergence results from the fact that California courts test consensual searches by a standard different from that applied by the Ninth Circuit. California examines consensual searches in light of the standard articulated by former Chief Justice Traynor in *People v. Michael*, 45 Cal.2d 751, 753, 290 P.2d 852, 854 (1955):

"Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is question of fact to be determined in the light of all the circumstances."

Accord, Castaneda v. Superior Court, 59 Cal.2d 439, 30 Cal.Rptr. 1 (1963); *People v. Smith*, 63 Cal.2d 779, 48 Cal.Rptr. 382 (1966); *People v. Johnson*, 68 Cal.2d 629, 68 Cal.Rptr. 441 (1968).

California courts focus their inquiry on whether the consent was truly voluntary. The consenting party's knowledge and understanding of his Fourth Amendment rights are relevant only to the extent that they evidence coercion or noncoercion. See *People v. Wilson*, 145 Cal.App.2d 1, 301 P.2d 974 (1956), limited in *People v. Linke*, 265 Cal.App.2d 297, 71 Cal.Rptr. 371 (1968); Comment, 10 Santa Clara Lawyer 205, 211 (1969).

The theory underlying the California rule is this: the Fourth Amendment proscribes only unreasonable searches and seizures; when consent is uncoerced, law enforcement officers have acted reasonably within the meaning of the Fourth Amendment and the search is valid. *People v. Michael*, *supra*, 45 Cal.2d at 753, 290 P.2d at 854. This view has led our courts to concentrate on the objective manifestations of consent.

The Ninth Circuit has adopted a basically different approach. Inquiry has centered on the consenting party's subjective state of mind: has he intentionally relinquished a known right or privilege? *Cipres v. United States*, 343 F.2d 95, 97-98 (9th Cir. 1965), criticized in *People v. Cirilli*, 265 Cal.App.2d 607, 611, 71 Cal.Rptr. 604, 607 (1968). This is the standard for waiver announced in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Its effect is to require of police officers clairvoyance or psychological insight equal to that of

reviewing courts. See *Robbins v. MacKenzie*, 364 F.2d 45, 49 (1st Cir. 1966).

Although consent is not equated with waiver in California courts, Comment, 10 Santa Clara Lawyer, *supra*, at 211, nor in all federal courts, Comment, 67 Col.L.Rev. 130, 132 (1967), the Ninth Circuit has applied its test in federal habeas corpus proceedings involving state prisoners. See, *e.g.*, *Oliver v. Amiotte*, *supra*; *Oliver v. Bowens*, *supra*. We cannot reconcile this practice with the declaration by this Court in *Ker v. California*, 374 U.S. 23, 24 (1963), that "The States are not precluded from developing workable rules governing arrests, searches and seizures." The California rule, reflecting the traditional approach to voluntariness, is the test applied by North Carolina and was impliedly approved by this Court in *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968):

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." See also Note 6 Calif. Western L. Rev. 216 (1970).

In an analogous situation, involving a wife's handing over items of physical evidence which incriminated her husband, this Court applied the same test, *i.e.*, were the wife's actions voluntary, *i.e.*, the product of her own free will, as opposed to a response to an assertion of official authority. *Coolidge v. New Hampshire*, 403 U.S. 443, 445, 489 (1971).

As the California consent rule is a constitutionally acceptable standard, it must be applied to state prisoners in federal habeas corpus proceedings. We ask this Court to reaffirm that "*Mapp* sounded no death knell for our federalism. . . ." *Ker v. California*, *supra*, at 31 (opinion of Mr. Justice Clark).

California courts uniformly hold that whether an apparent consent to search was in fact voluntarily given or was in submission to asserted authority is a question of fact. *People v. Michael*, *supra*; *People v. Shelton*, 60 Cal.2d 740, 36 Cal.Rptr. 433 (1964). Consent is also seen as a factual question by this Court, *United States v. Mitchell*, 322 U.S. 65 (1944); *Davis v. United States*, 328 U.S. 582 (1946).

Title 28, United States Code section 2254(d) declares that unless the State court hearing was unfair or defective in specified respects,

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a *factual* issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State . . . were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, *shall be presumed to be correct. . . .*" (Emphasis supplied.)

The state trial court made a factual finding that appellant's consent was voluntary. That determination was affirmed on appeal. Bustamonte received a full

and fair hearing at the trial and appellate court levels. The State court finding is entitled to the presumption authorized by Title 28, United States Code section 2254(d). Since, under *Bumper*, voluntariness is a constitutionally acceptable test, and since the petition does not allege that the State court hearings were in any respect inadequate, the claim of invalid consent should have been summarily rejected.

The Ninth Circuit, however, erroneously imposed upon the state its own waiver rule, essentially a questionable extension of *Miranda v. Arizona*, 384 U.S. 436 (1966). However, the *Miranda* admonition was required in the context of custodial interrogation in part because the questions of the police themselves imparted a right to a reply. However, "the mere asking of permission to . . . make a search carries with it the implication that the person can withhold permission. . . ." *People v. Chaddock*, 249 Cal.App.2d 483, 485-86, 57 Cal.Rptr. 582 (1967).

Warnings required before *custodial* interrogation are intended to eliminate conditions conducive to coercion, "to sterilize the police antechamber." *In re Lopez*, 62 Cal.2d 368, 374, 42 Cal.Rptr. 188, 192 (1965), cf. *Miranda v. Arizona*, *supra*, at 478 n. 46. Consents to search, however, are generally given at the suspect's residence, automobile, or some other public place. Where consent to search is obtained at police headquarters, the prosecution must overcome a strong presumption of invalidity. See, e.g., *Channel v. United States*, 285 F.2d 217 (9th Cir. 1960); *People v. Shelton*, 60 Cal.2d 740, 36 Cal.Rptr. 433 (1964). The state

and federal tests for consent are sufficiently sensitive to exclude evidence secured by coercive police conduct.

Coercion during police interrogation raises a danger of producing unreliable self-incriminating evidence. "[T]he rules governing searches are concerned not with the exclusion of unreliable evidence. . . ." *Gorman v. United States*, 380 F.2d 158, 164 (1st Cir. 1967).

The consent was voluntarily given.

When the police stopped the 1958 Ford, Gonzales was driving; appellant was seated in the front with Alcala; three men occupied the rear seat. Officer Rand requested the six occupants to step out of the automobile after Gonzales failed to produce a driver's license and only Alcala could furnish identification. Officer Rand asked Alcala if he could search the car. Alcala replied, "Sure, go ahead," according to Rand. Gonzales testified that Alcala consented freely, even casually, and actually aided the officers. The officers' search uncovered three checks under the left rear seat.

This is not a case where a party consented to a search knowing that it was likely to disclose evidence which would incriminate him. Alcala, not Bustamonte, consented to the search. As Alcala was in the front seat he could hardly know that his companions were hiding checks under the rear seat. There is no basis here for a presumption of coercion on the theory that "no sane man who denies his guilt would actually be willing that policemen search . . . for contraband

which is certain to be discovered." *Higgins v. United States*, 209 F.2d 819, 820 (D.C. Cir. 1954);¹ *Coolidge v. New Hampshire*, *supra*.

The early hour cannot be considered a coercive factor. *Cf. People v. Kennedy*, 256 Cal.App.2d 755, 64 Cal.Rptr. 345 (1967) (2:00 a.m.). The road where the stop was effected was peopled with twice as many suspects as officers. Since Bustamonte and his friends outnumbered the police six to three, the number of officers could hardly be coercive. The occupants of the Ford were not "questioned" regarding any crime, but merely asked to furnish a driver's license or identification. The traffic citation was issued to Gonzales, not to Alcala.

Here there was no "dramatic excitement of drawn guns," or arrest preceding consent. *Wren v. United States*, 352 F.2d 617, 619 (10th Cir. 1965). "The circumstances of the investigation by the police presents [sic] a calm, routine performance of duty by the officers. There is no evidence of any threats on the part of the officers or the use of any other means from which duress or coercion could be inferred." *Id.* at 620.

Alcala's expression of consent was specific, unequivocal, and affirmative. It was more than assent, it was an invitation. The atmosphere was not coercive but "congenial." *People v. Bustamonte*, 270 Cal.App.

¹This line of reasoning seems to have led federal courts to distrust and disfavor consensual searches. "One may question a logic which fails to consider that aspect of human nature which leads one person to believe he may bluff or beguile another." *People v. Linke*, 265 Cal.App.2d 297, 306, 71 Cal.Rptr. 371, 376 (1968).

2d 648, at 652, 76 Cal.Rptr. at 20 (1969). Alcala's subsequent assistance during the search confirms the voluntary nature of his consent.²

The state trial and appellate courts correctly concluded that Alcala was not overawed by the badge and that his consent was free and voluntary. The Ninth Circuit should have respected that finding.

II

CLAIMS RELATING TO SEARCH AND SEIZURE SHOULD NOT BE AVAILABLE TO STATE PRISONERS ON FEDERAL HABEAS CORPUS

Implicit in the decision of the court below is the proposition that Fourth Amendment claims can be raised on federal habeas corpus by state prisoners, a proposition as to which a five-member majority of the Court declared there is "no doubt." *Kaufman v. United States*, 394 U.S. 217, 225 (1969). We seek to raise such doubts and invite the Court to reconsider that proposition. It is true that previous decisions of this Court have made federal habeas corpus available to state prisoners to assert the exclusionary rule as a ground of setting aside their convictions. See *Harris v. Nelson*, 394 U.S. 286 (1969); *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Warden v. Hayden*, 387 U.S. 294 (1967); see also *Whiteley v. Warden*, 401 U.S. 560 (1971). But, as pointed out by Justice Black in his dissent, in the *Kaufman* case, this Court has never anticated

²Gonzales testified that Alcala opened the trunk.

a clear reason for this rule. *Id.* at 239. The attempted justification of the majority opinion, *i.e.*, "The availability of post conviction relief [for Fourth Amendment claims] serves significantly to secure the integrity of proceedings at or before trial and on appeal" (*Id.*, at 229) is unpersuasive, because it fails to assess the reasons for the exclusionary rule and weigh them against the disadvantages involved in raising that rule on collateral attack. We request the Court to undertake such an analysis here.

It is unanimously accepted by both proponents and critics of the exclusionary rule that its purpose is not to vindicate the interest of an individual defendant but rather to promote the public interest by deterring unreasonable searches. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914); *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955); *cf. Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411 (1971), dissenting opinion of Burger, C. J.; *Kaufman v. United States*, *supra*, 394 U.S. 217, 231 (1969), dissenting opinion of Black, J. Thus, any real assessment of the question of whether the exclusionary rule should be available on collateral attack requires weighing the deterrent effect of the exclusionary rule against the substantial detriment to the public interest involved in undermining the finality of criminal judgments.

Whatever deterrent value the exclusionary rule may have in criminal trials and on direct appeals, itself an uncertain question (see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411 [1971], dissenting

opinion of Burger, C. J.; Oakes, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. Rev. 665 [1970], it seems clear that such deterrence is attenuated after a judgment has become final. The point was simply and cogently put by Professor Anthony Amsterdam in his law review article entitled, *Search, Seizure and Section 2255*, 112 U. Pa. L. Rev. 378, in which he states as follows:

"In every litigation in which exclusion is in issue, a strong public interest in deterring official illegality is balanced against a strong public interest in convicting the guilty. [Footnote.] As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance. The courts apparently have recognized this; the foggy doctrines of 'standing' [footnote] and 'attenuation of taint' [footnote] appear responsive to it. . . . But if there is one class of cases that I would hazard to say is very probably beyond the point of diminishing returns, it is the class of search and seizure claims raised collaterally." *Id.* at 389-390, footnotes omitted.³

On the other side of the balance, the public interest in the finality of criminal judgments is substantial. To reopen for evidentiary hearing a criminal conviction

³Professor Amsterdam limited his article to collateral review of federal convictions, and in the course thereof stated, "it makes good sense to give a state criminal defendant a federal judge to try the facts underlying his federal constitutional claim." *Id.* at 380. However, despite any attempted qualification, the essential thrust of Professor Amsterdam's reasoning applies with equal force to assertion of the exclusionary rule as a ground for federal collateral attack on state convictions.

long final, as the Ninth Circuit has done here, can only further erode public confidence in the administration of criminal justice, tend to demoralize state trial and appellate judges, and, most important, sap the criminal law of its deterrent effect by clouding the certainty of punishment even after a judgment has been affirmed on appeal. Moreover, it is totally at odds with any notion of rehabilitating criminal offenders. "The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility." Bator, *Finality in Criminal Law and Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963).

We commend to the Court the analysis of former California Chief Justice Roger Traynor, who put the matter thusly:

"The purpose of the exclusionary rule is not to prevent the conviction of the innocent, but to deter unconstitutional methods of law enforcement. [Citations.] That purpose is adequately served when a state provides an orderly procedure for raising the question of illegally obtained evidence at or before trial and on appeal. The risk that the deterrent effect of the rule will be compromised by an occasional erroneous decision refusing to apply it is far outweighed by the disruption of the orderly administration of justice that would ensue if the issue could be relitigated over and over again on collateral attack." *In re Sterling*, 63 Cal.2d 486, 487-488, 47 Cal.Rptr. 205, 207, 407 P.2d 5, 7 (1965), quoting *In re Harris*, 56 Cal.2d 879, 883-884, 16 Cal.Rptr. 889, 892, 366 P.2d 305, 308 (1961).

This Court should re-examine *Kaufman* and hold that the exclusionary rule may not be raised on collateral attack.

CONCLUSION

We respectfully request the Court to grant a writ of certiorari and reverse the decision of the Court of Appeals.

Dated, San Francisco, California,
November 30, 1971.

EVELLE J. YOUNGER,

Attorney General of the State of California,

EDWARD P. O'BRIEN,

Deputy Attorney General,

ROBERT R. GRANUCCI,

Deputy Attorney General,

Attorneys for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals for the Ninth Circuit

Robert Bustamonte,	} No. 25,678
vs.	
Merle R. Schneckloth, Superintendent, California Conservation Center,	
Defendant-Appellee.	
Plaintiff-Appellant,	

[September 13, 1971]

On Appeal from the United States District Court
for the Northern District of California

Before: HAMLIN, MERRILL and ELY, Circuit
Judges

MERRILL, Circuit Judge:

This appeal is taken from an order of the District Court denying without hearing appellant's petition for a writ of habeas corpus.

On April 21, 1967, appellant was convicted in the California Superior Court for Santa Clara County of a violation of California Penal Code §475(a): possession of a completed check with intent to defraud. Judgment was affirmed on appeal to the California District Court of Appeal. *People v. Bustamonte*, 270

Cal.App.2d 648 (1969). Hearing was denied by the State Supreme Court.

In his petition for habeas corpus Bustamonte asserts that his state conviction resulted from a refusal of the state trial court to suppress evidence obtained as the result of an unlawful search and seizure.

In January, 1967, the proprietor of a carwash in Mountain View discovered that his business office had been broken into and that a check protector and a number of blank checks had been stolen. Later that month a Ford car with six occupants, one of whom was appellant, was stopped by a Sunnyvale police officer at approximately 2:40 A.M. The officer had noticed that a headlight and the license-plate light were burned out. He asked the driver for his license. When the driver failed to produce one the officer asked the other occupants for identification. Only Joe Alcala, who stated he had borrowed the car from his brother, produced a driver's license. After further discussion the officer asked the six occupants to step out. A traffic citation was issued for the defective lights, as well as for the driver's failure to produce a license. After being joined by another officer, the first officer then questioned each of the occupants. A third police car arrived. The first officer then asked Alcala if he could search the car, and Alcala consented. Alcala was not advised that he had the right to refuse to consent, nor are we referred to any indication in the record that he had knowledge of such right. Three checks of the carwash were found wadded up under the left rear seat. Each was signed in the name of the owner

of the carwash and was filled in by resort to a check protector. On the basis of statements later obtained from the driver of the car, a warrant was obtained for the search of two other cars. These searches resulted in the seizure of the check protector and several blank checks.

The principal contention made on this appeal is that the state trial court erred in refusing to suppress the evidence obtained in the search of the Ford. The state courts proceeded on the theory that the search had been consented to and was therefore lawful. Appellant takes issue with this determination on the ground that the Government has failed to demonstrate that the consent was given with knowledge that it could be withheld.

At the time of the search there was no probable cause to believe that the car contained anything that could properly be seized. The search, thus, was one from which Alcala had a constitutional right to be free.¹ Any consent to the search, then, amounted to a waiver of a constitutional right and, to be effective, must meet the established standards for constitutional waiver.

These have been discussed by this court in *Cipres v. United States*, 343 F.2d 95 (9th Cir. 1965), and *Schoepflin v. United States*, 391 F.2d 390 (9th Cir. 1968).

¹The other occupants of the car also have standing to assert Alcala's right. *Jones v. United States*, 362 U.S. 257 (1960); compare *Cotton v. United States*, 371 F.2d 385, 390-91 (9th Cir. 1967), with *Diaz-Rosendo v. United States*, 357 F.2d 124, 132 (9th Cir. 1966) (*en banc*).

" * * * a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld * * *." *Cipres v. United States*, 343 F.2d 95, 97 (9th Cir. 1965).²

From the record before us it is not clear that the California courts have made an adequate finding of the necessary understanding. With reference to Bustamonte's knowledge, the California Court of Appeal, *People v. Bustamonte*, 270 Cal.App.2d at 653, stated:

"The basic premise behind the California rule was stated in *People v. MacIntosh* [264 A.C.A. 834] at page 838: 'When permission is sought from a person of ordinary intelligence the very fact that consent is given * * * carries the implication that the alternative of a refusal existed.' "

It would appear that the California courts, in addition to finding that the atmosphere was not coercive, have relied entirely on the verbal expression of assent. They have reasoned that the mere request for consent carries with it an implication that consent may be withheld and that knowledge of this implication may be inferred from assent. Yet, as we have noted, mere

²We find nothing in the Supreme Court's opinion in *Bumper v. North Carolina*, 391 U.S. 543 (1968), to cast doubt on the continued vitality or breadth of these principles. On the contrary, *Bumper*, although not concerned with the issue before us now, expressly approved a number of lower court opinions which had required that waiver of Fourth Amendment rights be both uncoerced and intelligent.

verbal assent is not enough. Further, in our view, the "implication" apparently relied upon by the California courts can hardly suffice as a general rule. Under many circumstances a reasonable person might read an officer's "May I" as the courteous expression of a demand backed by force of law.

We conclude that the District Court should direct its attention to the issue of the existence of such knowledge as is required under *Cipres* and *Schoepflin*. If it concludes that no adequate and acceptable state court finding has been made upon this issue, then it should make its own finding, conducting a hearing if necessary to develop the facts.

We find no error in the District Court's rulings with respect to other grounds asserted in the petition.

The District Court order denying writ is vacated and the matter is remanded for further proceedings.

Appendix B

United States District Court
for the Northern District of California

C-70 303

Robert Clyde Bustamonte,	}
vs.	
Merle R. Schneckloth, Superintendent, California Conservation Center,	
Respondent.	

**ORDER GRANTING MOTION TO FILE IN
FORMA PAUPERIS AND DENYING
PETITION FOR WRIT OF HABEAS CORPUS.**

Petitioner alleges that the search of two automobiles which produced the checks in question was unconstitutional. He argues that the affidavit supporting the search warrant was defective in that the informant was not proven to be reliable, and there were no underlying facts to allow the magistrate to make an independent judgment. As the California Court of Appeals decision points out, the situation in which the informant was found lent credence to his reliability. Regarding the element of underlying facts, this was satisfied by the corroboration of the informant's

facts. *People v. Bustamonte*, 270 A.C.A. 707, 714-15 (1969).

Petitioner's claim that there was no consent to the search is unsubstantiated.

Petitioner's third claim is that the trial court erred in allowing the policeman to testify that the petitioner said in response to *Miranda* warnings, "I don't care to say anything." This error does not, in view of the circumstances, meet the constitutional test of prejudicial error. *See Chapman v. California*, 386 U.S. 18 (1967).

It Is Hereby Ordered that the petition for a writ of habeas corpus be denied.

Dated: February 6, 1970.

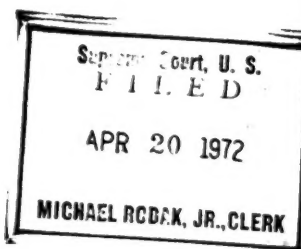
Alfonso J. Zirpoli,
United States District Judge

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1971

No. 732
71-



MERLE R. SCHNECKLOTH, Superintendent,
California Conservation Center, *Petitioner*,

VS.

ROBERT CLYDE BUSTAMONTE, *Respondent*.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

EVELLE J. YOUNGER,
Attorney General of the State of California,

HERBERT L. ASHBY,
Chief Assistant Attorney General—
Criminal Division,

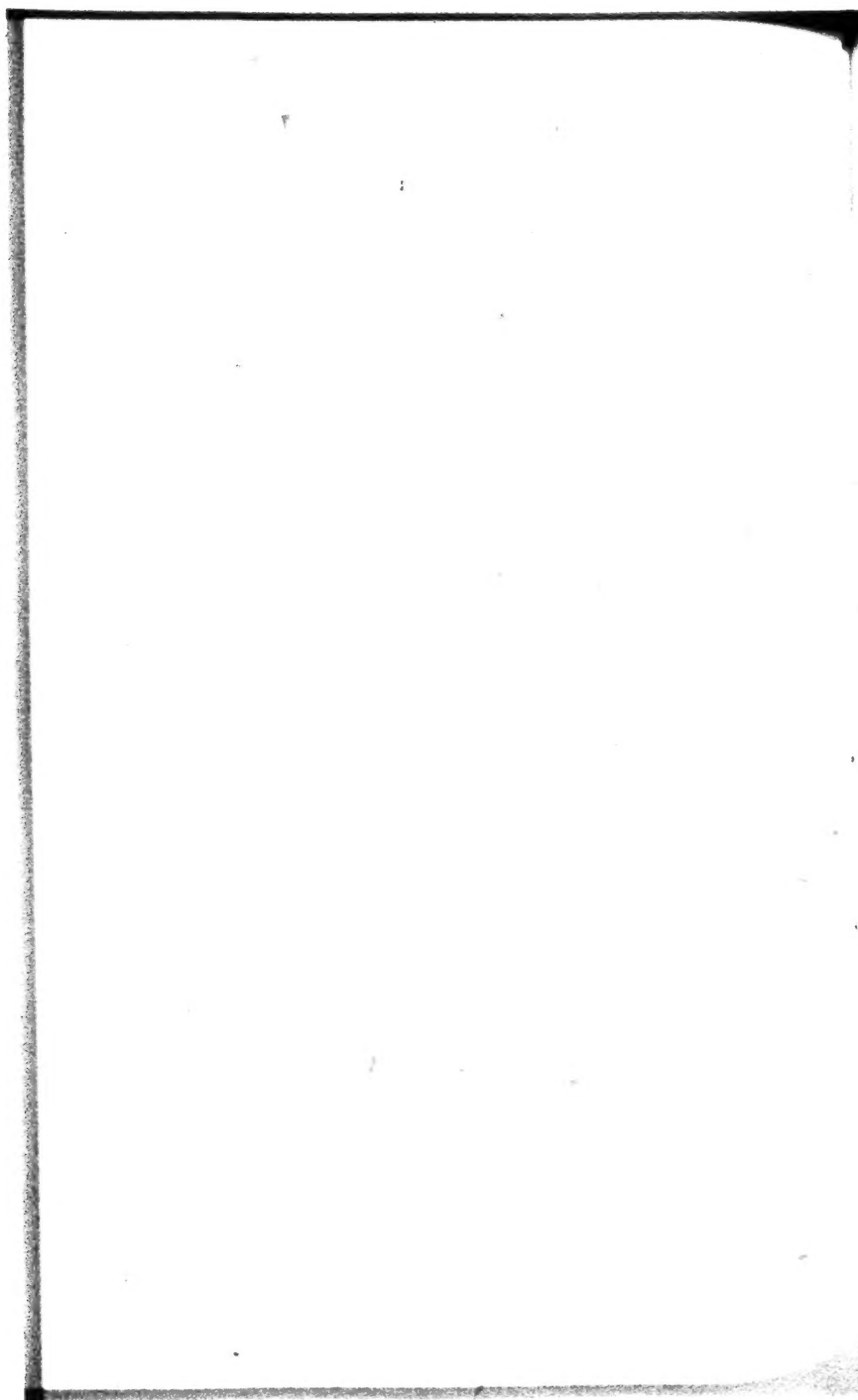
DORIS H. MAIER,
Assistant Attorney General—Writs Section,

EDWARD P. O'BRIEN,
Deputy Attorney General,

ROBERT R. GRANUCCI,
Deputy Attorney General,

6000 State Building,
San Francisco, California 94102,
Telephone: (415) 557-1959,

Attorneys for Petitioner.



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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 732

MERLE R. SCHNECKLOTH, Superintendent,
California Conservation Center, *Petitioner*,

VS.

ROBERT CLYDE BUSTAMONTE, *Respondent*.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is printed in the appendix at pages 6 through 10 and reported at 448 F.2d 699; the memorandum opinion and order of the United States District Court for the Northern District of California is unreported and is printed in the appendix at pages 11 and 12.

JURISDICTION

The judgment of the court of appeals was entered September 13, 1971. The petition for writ of certiorari was docketed in this Court on December 3, 1971 and granted February 28, 1972. The jurisdiction of this Court is conferred by Title 28, United States Code section 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding invalid the search of an automobile based upon a verbal expression of consent to search in an atmosphere free from coercion, on the sole ground that the state failed to demonstrate that the consent was given with knowledge that it could be withheld.

2. Whether claims relating to search and seizure should be available to a state prisoner seeking to set aside his final conviction on federal habeas corpus.

STATEMENT OF THE CASE

A. Proceedings in the state court.

Robert Clyde Bustamonte, respondent herein, was convicted by a jury of possession of a completed check with intent to defraud in violation of California Penal Code section 475(a). A state prison sentence of from one to fourteen years was imposed. On appeal to the California Court of Appeal for the First Appellate District, Bustamonte's conviction was affirmed in an opinion set fourth in the appendix at pages 13

through 25, and reported at 270 Cal.App.2d 648, 76 Cal.Rptr. 17 (1969). Bustamonte's petition to the California Supreme Court for a hearing was denied May 8, 1969.

B. Proceedings in the federal courts.

On May 23, 1969, Bustamonte petitioned the United States District Court for the Northern District of California for a writ of habeas corpus. The petition was filed on February 10, 1970; on that date the district court also filed an order granting Bustamonte's motion to file in forma pauperis and denying the petition. This order is printed in the appendix at pages 11 and 12.

Bustamonte filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit on March 9, 1970; on that date the district court granted a certificate of probable cause and permitted Bustamonte to proceed without prepayment of cost.

On September 13, 1971, the court of appeals filed its opinion vacating the order of the district court denying the writ and remanded the matter to the district court for further proceedings. Appendix pp. 6 through 10.

C. Statement of the facts.

The facts of this case are stated in the opinion of the California Court of Appeal in *People v. Bustamonte*, *supra*, as follows:

"On the morning of January 19, 1967, Charles Kehoe, owner of the Speedway Car Wash in Mountain View, discovered that the business office

had been burglarized some time since he had closed on the previous day. A check-writing machine, known as a check protector, and a number of blank checks had been removed from the office.

"On January 21, 1967, Joe Gonzales and Joe Alcala went with defendant to the Food Fair Market in Mountain View. According to the testimony of Gonzales, defendant filled out a check while they were in the parking lot. This check was a Speedway Car Wash check 'protectorized' in the amount of \$63.75 and defendant made it out to a 'Joe Garcia' and signed it with Kehoe's name. Gonzales took the check into the market where he cashed it in the process of buying a carton of cigarettes. Kehoe identified the check payable to Garcia and stated the signature was not his. After cashing the check on January 21, defendant, Gonzales and Alcala went to defendant's home. Gonzales saw defendant and Alcala lean over the open trunk of defendant's parked Oldsmobile automobile and then the two returned to the truck where Gonzales was waiting, bringing with them two additional Speedway Car Wash blank checks. The amounts of money were filled in on the checks but no names or signatures were entered. The men next unsuccessfully attempted to cash another check at the Blue Bonnett Bar in Sunnyvale.

"Gonzales testified that at some time before the incidents of January 21 defendant had shown him the check protector and some blank checks which were contained in the trunk of a Camero automobile which had been rented by defendant.

"On January 31, 1967, defendant Alcala and Gonzales went to San Jose to find persons willing

to use false identification for the purpose of cashing checks. At about 11 p.m. they picked up three other men. Attempts to cash checks at grocery stores and a bar were futile. During the evening they stopped at the Moonlite Shopping Center where Gonzales saw defendant take some checks from defendant's Renault automobile which was in the parking lot.

"Police Officer James Rand of the Sunnyvale Department of Public Safety was in a police vehicle alone on routine patrol at approximately 2:40 a.m. on January 31, 1967. He observed an oncoming vehicle which had only one functioning headlight. Rand made a U-turn and also observed that the automobile in question did not have an automobile license plate light. He stopped the automobile which was a black 1958 Ford 4-door sedan. Six men were in the automobile at the time it was stopped, and Rand testified that defendant was in the front seat along with Alcalá, and that Gonzales was driving. After Gonzales failed to produce a driver's license, Officer Rand asked if any of the occupants of the Ford had identification. Only Alcalá produced a driver's license and he indicated that the automobile belonged to his brother. Officer Rand asked the occupants to step out of the automobile. After the men were out of the car and after Officer Rand was joined by Officer Bissell and Captain Crabtree, he asked Alcalá if he could search the car. According to Officer Rand's testimony, Alcalá replied 'Sure, go ahead.' Gonzales also testified that Alcalá had given permission for the search and had actually aided the officer. Officer Rand and Captain Crabtree searched the Ford. Waddled up under the left rear seat they found three

checks. Each of the checks was 'protectorized' in the amount of \$67.34, each was signed with the name of Kehoe as maker, and each was a Speedway Car Wash check. One was payable to Robert Gomez and two were payable to Jino Anthony.

"Later, pursuant to a search warrant, the Renault at the Moonlite Shopping Center and defendant's Oldsmobile in Sunnysvale were searched. Two checks were found in the Renault and the check protector and several blank checks were found in the Oldsmobile, along with a number of traffic citations naming defendant. A criminologist testified that in his opinion the writing on the Speedway Car Wash checks was the writing of defendant.

Search of the Ford

"At the time that Officer Rand and Captain Crabtree searched the Ford automobile and discovered the three completed checks, there was a total of three police officers and three police vehicles on the highway near the stopped automobile. The occupants were asked to step out of the car and at one point Gonzales was told to stand by the car; at another time Alcala was told to back away from the area of the search. Gonzales was also given a citation for the missing lights and for his failure to produce a driver's license. According to Gonzales' testimony, the police cars did not have the passengers hemmed in. No one was under arrest at the time of the search and none of the individuals had been advised as to any constitutional rights. After testimony was taken in chambers on the constitutionality of the search, the court ruled that there had been consent to the search and the motion of

defense counsel to suppress the evidence was denied." Appendix pp. 14-17.

SUMMARY OF ARGUMENT

The California trial and appellate courts found that Bustamonte's consent to search was voluntarily given. California evaluates consent searches under an objective standard; the Ninth Circuit has held this standard unconstitutional and substituted the requirement of a knowing waiver of Fourth Amendment rights. However, the California standard is constitutional, finding its counterpart in decisions of this Court. Since California's consent rule is a constitutionally acceptable standard, the federal courts are required to apply it in habeas corpus cases involving state prisoners. *Ker v. California*, 374 U.S. 23 (1963). If on the other hand, a waiver standard is constitutionally required, third party consent searches will become virtually impossible, and an admonition respecting Fourth Amendment rights may be made a prerequisite to the validity of a consent search. In the present case, judged by California's consent rule, there is no doubt that the consent given by Alcala was voluntary.

Alternatively, we urge that because the advantages of the exclusionary rule as a deterrent to unlawful police conduct are doubtful, as weighed against the real disadvantages to the states involved in subjecting final criminal judgments to collateral attack based on the exclusionary rule, this Court should hold that

such claims can no longer be asserted on federal habeas corpus. Recent decisions of this Court which guarantee procedural fairness, *i.e.*, the right to counsel, confrontation and the like, are sufficient to insure the integrity of state court procedure. On the other hand undermining the finality of state criminal judgments, by allowing the litigation and relitigation of complex and difficult Fourth Amendment claims having no relationship to guilt or innocence, serves no useful purpose and imposes an unnecessary burden upon the administration of justice.

ARGUMENT

I

THE FORD IN WHICH BUSTAMONTE WAS RIDING WAS SEARCHED PURSUANT TO A VALID CONSENT AND THE COURT OF APPEALS ERRED IN HOLDING OTHERWISE.

This case involves nothing less than the constitutionality of California's standard for determining the validity of consent searches. We ask this Court to reaffirm that "*Mapp* sounded no death knell for our federalism. . . ." *Ker v. California*, 374 U.S. 23, 31 (1963) (opinion of Mr. Justice Clark).

Ever since this state adopted the exclusionary rule in 1955 (see *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 [1955]), California courts have evaluated consensual searches under the standard articulated by former Chief Justice Traynor in *People v. Michael*, 45 Cal.2d 751, 753, 290 P.2d 852, 854 (1955):

"Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an expressed or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances." Accord, *Castenada v. Superior Court*, 59 Cal.2d 439, 30 Cal.Rptr. 1 (1963); *People v. Smith*, 63 Cal.2d 779, 48 Cal.Rptr. 382 (1966); *People v. Johnson*, 68 Cal.2d 629, 68 Cal.Rptr. 441 (1968).

California courts focus their inquiry on whether the consent was truly voluntary. The consenting party's knowledge and understanding of his Fourth Amendment rights are relevant to the extent that they evidence coercion or non-coercion, but his subjective knowledge and understanding of those rights is not determinative. See *People v. Wilson*, 145 Cal.App.2d 1, 301 P.2d 974 (1956), limited in *People v. Linke*, 265 Cal.App.2d 297, 71 Cal.Rptr. 371 (1968); *Comment*, 10 SANTA CLARA LAWYER 205, 211 (1969).

The theory underlying the California rule is this: The Fourth Amendment proscribes only unreasonable searches and seizures; when consent is uncoerced, law enforcement officers have acted reasonably within the meaning of the Fourth Amendment and the search is valid. *People v. Michael*, *supra*, 45 Cal.2d at 753, 290 P.2d at 854.

Thus, California courts, concentrating upon the conduct of the officer rather than on the subjective state of mind of the consenting party, hold that "an objective standard should be used in determining whether there has been a valid consent to search. . . ."

People v. Gurley, 23 Cal.App.3d 536, 555, 100 Cal. Rptr. 407, 420 (1972). This theory was articulated by one writer as follows:

"It is elementary that the fourth amendment does not address itself to evidentiary questions but rather the right to be free from unreasonable intrusions.

* * *

"The very word 'unreasonable' could be the key word to this amendment as it suggests a test which is not only largely subjective but discretionary as well. As the amendment affords freedom from 'unreasonable' searches and seizures only, the only real question before a trial judge is the reasonableness of the search. Is it really unreasonable to search property where the owner does not object? It would appear that a search which does not degrade or in any other way affect the dignity of the person whose property is being searched would not be unreasonable. . . . Of course, if there is any evidence of coercion or misrepresentation by the police, the consent would not be valid."

D. Owens, *Consent to Warrantless Search*, 3 JOHN MARSHALL JOURNAL OF PRACTICE AND PROCEDURE, 403, 419-420 (1970).

The Ninth Circuit has adopted an essentially different approach in evaluating the validity of a consent. That court focuses inquiry on the consenting party's subjective state of mind: Has he intentionally relinquished a known right or privilege? *Cipres v. United States*, 343 F.2d 95, 97-98 (9th Cir. 1965); *Schoepflin v. United States*, 391 F.2d 390 (9th Cir.

1968). This is the standard for waiver first announced in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Its effect is to require of police officers either clairvoyance or an unrealistic degree of psychological insight. See *Robbins v. MacKenzie*, 364 F.2d 45, 49 (1st Cir. 1966). The Ninth Circuit rule was criticized in *People v. Cirilli*, 265 Cal.App.2d 607; 71 Cal.Rptr. 604 (1968). "The reasonableness of a belief that consent has freely been given is the very matter at issue, but it is an objective reasonableness as viewed by the court, not the subjective opinion of the officer that it was reasonable to believe consent had been given." *Id.* at 611, 71 Cal.Rptr. at 607.

However, what is at issue here is not so much the intrinsic merits of the Ninth Circuit rule but rather, the power of that court to impose it upon the states as the sole valid ground for determining the validity of a consent search. "Federal authority was never intended to be a 'ramrod' to compel conformity to nonconstitutional standards." *California v. Green*, 399 U.S. 149, 172 (1970), concurring opinion of Chief Justice Burger. However, the Ninth Circuit has been "ramrodding" its rule upon the states by applying its subjective waiver test in habeas corpus cases involving state prisoners. See *e.g.*, *Cunningham v. Heinze*, 352 F.2d 1, 3 (9th Cir. 1965); *Oliver v. Amiotte*, 382 F.2d 987 (9th Cir. 1967); *Oliver v. Bowens*, 386 F.2d 688 (9th Cir. 1967); *cf.*, *State of Montana v. Tomich*, 332 F.2d 987, 990 (9th Cir. 1964).

This approach is irreconcilable with the declaration of this Court in *Ker v. California*, *supra*, 374 U.S. 23,

24 (1963) that "the states are not precluded from developing workable rules governing arrests, searches and seizures."

A. California's consent rule is constitutional.

The California rule reflecting the voluntariness approach to consent searches was impliedly approved by this Court in *Bumper v. North Carolina*, 391 U.S. 543, 548-549 (1968):

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." See also Note, 6 Cal. Western L. Rev. 216 (1970).

California courts uniformly hold that whether an apparent consent to search was in fact voluntarily given or was in submission to asserted authority is a question of fact. *People v. Michael*, *supra*; *People v. Shelton*, 60 Cal.2d 740, 36 Cal.Rptr. 433 (1964); *People v. Gurley*, *supra*, 23 Cal.App.3d 536, 550, 100 Cal.Rptr. 407, 416-417 (1972). Consent is also viewed as a factual question by this Court. *United States v. Mitchell*, 322 U.S. 65 (1944); *Davis v. United States*, 328 U.S. 582 (1946).

Title 28, United States Code section 2254(d) declares that unless the State court hearing was unfair or defective in specified respects,

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment

of a State court, a determination after a hearing on the merits of a *factual* issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State . . . were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, *shall be presumed to be correct*. . . ." (Emphasis supplied.)

After an in chambers hearing on Bustamonte's motion to suppress the state trial court made a factual finding that Alcala's consent was voluntary. Appendix p. 57. That determination was affirmed on appeal. Thus, Bustamonte received a full and fair hearing at the state trial and appellate levels in which the courts applied a constitutionally acceptable standard of law. Accordingly, the state court finding was entitled to the presumption of correctness afforded by Title 28, United States Code section 2254(d). Since, under *Bumper*, voluntariness is a constitutionally acceptable test and since Bustamonte's petition did not allege that the state court hearings were in any respect inadequate, apart from his claim that the state applied an erroneous legal standard, the claim of invalid consent should have been summarily rejected by the court of appeals as it was by the district court. *Procu- nier v. Atchley*, 400 U.S. 446, 454 (1971).

If, on the other hand, California's voluntariness standard is unconstitutional—and this is no less than what the Ninth Circuit held—and in its place a waiver standard is imposed, then serious consequences ensue which the Court will eventually have to face. It should face these consequences now instead of being con-

fronted in later cases with the dilemma of choosing to vindicate the waiver standard at the expense of settled principles heretofore felt to be wholly consistent with the Fourth Amendment. *Cf. Chimel v. California*, 395 U.S. 752, 769, (1969) (concurring opinion of Mr. Justice Harlan). For if the waiver standard is imposed, then this Court in addition to overruling or limiting *Bumper v. North Carolina*, *supra*, will have to overrule those cases which have approved third party consent searches, the apparent authority doctrine, and searches based on a reasonable mistake of fact. It will probably also have to impose a warning requirement akin to the *Miranda* rule.¹

B. Third party consent searches.

A waiver approach would make valid third party consent searches virtually impossible. An excellent description of the current law on third party consent searches appears in *United States v. Martinez*, 450 F.2d 864 (8th Cir. 1971), wherein the court of appeals stated as follows:

"Originally couched in terms of a distinct personal right of the subject of the search which could be waived only directly or through an agent, [footnote omitted] the consent exception as applied to third party consents has recently been focused on the third party. His legal and possessory rights to the premises or items searched, his relationship to the subject of the search and the

¹*Miranda v. Arizona*, 384 U.S. 436 (1966). Ironically, it appears that *Miranda* itself is under reexamination. *Pennsylvania v. Ware*, No. 71-964, cert. granted March 14, 1972, 40 U.S.L. Week 3449.

circumstances as they objectively appear to the police at the time of the search are all to be considered in determining whether the third party possessed an independent right to consent to a warrantless search by the police which will operate to foreclose subsequent attempts at suppression by the subject of the search." *Id.* at 865.

However, advocates of a strict waiver standard admit that it would curtail if not eliminate third party consent searches. Under a waiver standard searches pursuant to consent by a third party would be upheld only in those rare cases where the third party is actually an agent of the nonconsenting party and is empowered to authorize a search on the latter's behalf, or when the consenting party's interest in authorizing a particular search clearly dominate the nonconsenter's interest in privacy. Note, *Third Party Consent to Search and Seizure*, 33 U.CHI.L.REV. 797 (1966); Note, *Consent Searches, A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 149-150 (1967).

Ironically, at approximately the same time the Ninth Circuit was imposing upon California the waiver standard articulated in the *Cipres* and *Schoepflin* cases, *supra*, that court declined to apply it in federal prosecutions which used evidence obtained in third party consent searches. Thus, in *United States v. Wilson*, 447 F.2d 1 (9th Cir. 1971), the court characterized *Cipres* and *Schoepflin* as coercion cases and went on to hold that a person living in a common law relationship with the defendant had validly consented to a search of the apartment in which they were liv-

ing. The court decided the issue of voluntariness on all the circumstances of the case and did not require a showing of knowing waiver. 447 F.2d 4-6. Similarly, in *United States v. Novick* 450 F.2d 1111 (9th Cir. 1971), the court used the same objective standard approach.

A waiver approach to third party consent searches would be wholly inconsistent with the decisions of this Court. In *Coolidge v. New Hampshire*, 403 U.S. 443, where a wife handed over to investigating officers items of physical evidence which incriminated her husband, this Court applied an objective test, i.e., were her actions voluntary, the product of her own free will, as opposed to a response to an assertion of official authority. *Coolidge v. New Hampshire*, *supra*, 403 U.S. 443, 445, 489 (1971). In *Frazier v. Cupp*, 394 U.S. 731 (1969), the Court applied the third party consent doctrine to hold that a defendant had assumed the risk that his companion would permit the police to search a shared duffle bag (394 U.S. at 740).

By way of contrast, in *Stoner v. California*, 376 U.S. 483 (1964), the Court found "[No] substance to the claim that the search was reasonable because the police, relying upon the night clerk's expressions of consent, had a reasonable basis for belief that the clerk had authority to consent to the search." *Id.* at 448. (Emphasis added.) Implicit in the *Stoner* opinion is the assumption that if the police reasonably believed that the consenting party had authority to consent, the search based upon consent would have been valid.

This would accord with *Hill v. California*, 401 U.S. 797 (1971), where the Court upheld the validity of an arrest based upon a reasonable mistake of fact on the part of the arresting officers.

C. Requirement of an admonition.

Implicit in the decision below imposing a waiver requirement is the necessity of a warning analogous to that decreed by this court in *Miranda v. Arizona*, 384 U.S. 436 (1966), although the Ninth Circuit did not go so far as to state that a specific admonition was required, and has specifically rejected that requirement in federal prosecutions. *United States v. Noa*, 443 F.2d 114, 147 (9th Cir. 1971). However, wherever a waiver standard has been imposed by the Court, the requirement of an admonition or independent evidence of a knowing waiver almost necessarily follows. See *e.g.*, *Carnley v. Cochran*, 369 U.S. 506, 513 (1962); *Miranda v. Arizona*, *supra*, 384 U.S. 436, 469-473 (1966); *McCarthy v. United States*, 394 U.S. 459 (1969); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Some writers, taking their cue from these cases and assuming that a consent search must be based on a waiver of Fourth Amendment rights, have urged that a warning is necessary before any effective consent. Note, *Consent Searches, A Reappraisal After Miranda v. Arizona*, *supra*, 67 COLUM. L. REV. 130 (1967) *supra*; Note, *Consent Searches—Relinquishment of Fourth Amendment Rights—The Need for a Warning*, 5 GONZAGA L. REV. 315 (1970); Note, *Consent Search: Waiver of Fourth Amendment Rights*, 12 ST. LOUIS U.L.J. (1968); *cf.* Owens, *supra*.

The overwhelming weight of the case law is to the contrary. California courts, the federal courts and courts of other jurisdictions have rejected any requirement that one whose consent is sought for a search must first be advised of his Fourth Amendment rights. *Blair v. Pitchess*, 5 Cal.3d 258, 275, fn. 8; *People v. Superior Court*, 71 Cal.2d 265, 270, fn. 7 (1969); *People v. Gurley*, 23 Cal.App.3d 536, 554-555, 100 Cal.Rptr. 407 (1972); *People v. Stark*, 275 Cal. App.2d 712, 714-715 (1969), 80 Cal.Rptr. 307, 308-309; *People v. Linke*, 265 Cal.App.2d 297, 314, 71 Cal.Rptr. 371 (1968); *People v. Campuzano*, 254 Cal.App.2d 52, 61 Cal.Rptr. 695 (1967); *People v. Roberts*, 246 Cal.App.2d 715, 55 Cal.Rptr. 62 (1966); *Gorman v. United States*, 380 F.2d 158, 164 (1st Cir. 1967); *United States ex rel. Cole v. Mancusi*, 429 F.2d 61, 66 (2d Cir. 1970); *United States ex rel. Harris v. Hendricks*, 423 F.2d 1096 (3d Cir. 1970); *Government of Virgin Islands v. Berne*, 412 F.2d 1055 (3d Cir. 1970); *United States v. Vickers*, 387 F.2d 703, 707 (4th Cir. 1967); *United States v. Goosbey*, 419 F.2d 818 (6th Cir. 1970); *Byrd v. Lane*, 398 F.2d 750, 754-755 (7th Cir. 1968); *United States v. Noa*, *supra* 443 F.2d 144 (9th Cir. 1971); *Leeper v. United States*, 446 F.2d 281 (10th Cir. 1971); *White v. United States*, 444 F.2d 724, 726 (10th Cir. 1971); *Phillips v. People*, 170 Colo. 520, 462 P.2d 594 (1969); *State v. Custer*, 251 So.2d 287 (Fla. App. 1971); *State v. Oldham*, 92 Id. 124, 438 P.2d 275 (1968); *State v. McCarty*, 199 Kans. 116, 427 P.2d 616 (1967); *Hohnke v. Commonwealth*, 451 S.W.2d 162 (Ky. Ct. App. 1970); *State v. Andrus*, 250 La. 765, 199 So.2d 867

(1967); *Morgan v. State*, 2 Md.App. 440, 234 A.2d 762 (1967); *State v. Forney*, 181 Nebr. 767, 150 N.W.2d 915 (1967); *State v. Douglas*, 488 P.2d 1366 (Ore. 1971); *Commonwealth v. Anderson*, 208 Pa. Super. 323, 222 A.2d 495 (1966); *State v. Leavitt*, 103 R.I. 273, 237 A.2d 309 (1968); *Weeks v. State*, 417 S.W.2d 716 (Tex. Crim. App. 1967); *State v. Johnson*, 71 Wash. 239, 427 P.2d 705 (1967).

Reason no less than the weight of authority compels rejection of a *Miranda* approach in the area of consensual searches. The original justification of the *Miranda* admonition was that in the context of custodial interrogation, the questions of the police were assumed themselves to impart a right to an answer. However, "the mere asking of permission to . . . make a search carries with it the implication that the person can withhold permission. . . ." *People v. Chad-dock*, 249 Cal.App.2d 483, 485-86, 57 Cal.Rptr. 582 (1967).

Warnings required before *custodial* interrogation are intended to eliminate conditions conducive to coercion, "to sterilize the police antechamber." *In re Lopez*, 62 Cal.2d 368, 374, 42 Cal.Rptr. 188, 192 (1965), *cf. Miranda v. Arizona, supra*, at 478 n. 46. Consents to search generally are given at the suspect's residence, automobile, or some other public place. Where consent is obtained at police headquarters, the prosecution must satisfy a correspondingly heavier burden of proof. See, *e.g., Channel v. United States*, 285 F.2d 217 (9th Cir. 1960); *People v. Shelton*, 60 Cal.2d 740, 36 Cal.Rptr. 433 (1964). The state and

federal tests for consent are sufficiently sensitive to exclude evidence secured by coercive police conduct.

Coercion during police interrogation raises a danger of producing unreliable self-incriminating evidence. "[T]he rules governing searches are not concerned with the exclusion of unreliable evidence. . . ." *Gorman v. United States, supra*, at 164.

Proponents of the *Miranda* rule emphasize that it will improve police-citizen relationships because the admonition demonstrates to the citizen that the police stand ready to respect his constitutional rights. Police convey the same impression when they *request* consent to search. On the other hand, if a suspect withholds consent after police advice, officers will arrest and conduct an incidental search in cases where they believe probable cause exists. This is not calculated to improve police-citizen relationships.

"A principal objective of . . . [*Miranda*] was to establish safeguards that would liberate courts insofar as possible from the difficult and troublesome necessity of adjudicating in each case whether coercive influences, psychological or physical, had been employed to secure admissions and confession." *People v. Fioritto*, 68 Cal.2d 714, 717, 68 Cal.Rptr. 817, 818 (1968). The difficulty of resolving swearing contests between police and defendants prompted the search for a self-executing rule. See *Crooker v. California*, 357 U.S. 433, 443-44 (1958) (dissenting opinion of Mr. Justice Douglas).²

²The *Miranda* admonition also facilitates the determination of whether there has been an effective *waiver*; we urge that the waiver test is inapplicable to consent to search.

Proof that the suspect was admonished *together* with his subsequent statement, the existence of which independently evidences cooperation, renders it unnecessary for courts to prefer the testimony of the police to that of the defendant. The same is not true in the context of consensual searches. Conflicts in testimony now center on the precise words of the defendant relied upon by the police. Were a Fourth Amendment warning required the conflict would be about whether the admonition was given, the scope of the consent, and revocation of consent. The tangible evidence disclosed by the search, unlike an admission or confession, would be silent on these questions. There is no escape from the judicial dilemma posed by consensual searches or from the overwhelming body of authority rejecting any warning requirement.

Moreover, considerations of practicality compel rejection of a *Miranda* approach. Following the *Miranda* decision, one of the commentators who urged extension of that rule to consent searches (*See, Consent Searches: A Reappraisal After Miranda v. Arizona, supra*, 67 COLUM. L. REV. 130 [1967]), after considerable exploration of what an effective Fourth Amendment warning should convey at 150-158, set out a suggested warning.

"You have a right to refuse to allow me to search your home, and if you decide to refuse, I will respect your refusal. If you do decide to let me search, you won't be able to change your mind later on, and during the search I'll be able to look in places and take things which I couldn't even if I could get a search warrant. You have

a right to a lawyer before you decide, and if you can't afford a lawyer we will get you one and you won't have to pay for him. There are many different laws which are designed to protect you from my searching, but they are too complicated for me to explain or for you to understand, so if you think you would like to take advantage of this very important information, you will need a lawyer to help you before you tell me I can search." *Id.* at 158.

We submit that the very complexity of such a warning proves its unworkability, and the basic unsoundness of any theory that would require it.

D. Bustamonte's consent was truly voluntary.

In its opinion, the Ninth Circuit appears to concede that the atmosphere in which consent was given was noncoercive and that permission to search was requested and given. This view of the facts is correct.

When the police stopped the 1958 Ford, Gonzales was driving; appellant was seated in the front with Alcalá; three men occupied the rear seat. Officer Rand requested the six occupants to step out of the automobile after Gonzales failed to produce a driver's license and only Alcalá could furnish identification. Officer Rand asked Alcalá if he could search the car. Alcalá replied, "Sure, go ahead," according to Rand. Gonzales testified that Alcalá consented freely, even casually, and actually aided the officers. The officers' search uncovered three checks under the left rear seat.

This is not a case where a party consented to a search knowing that it was likely to disclose evidence which would incriminate him. Alcalá, not Bustamonte, consented to the search. As Alcalá was in the front seat he could hardly know that his companions were hiding checks under the rear seat. There is no basis here for a presumption of coercion on the theory that "no sane man who denies his guilt would actually be willing that policemen search . . . for contraband which is certain to be discovered." *Higgins v. United States*, 209 F.2d 819, 820 (D.C. Cir. 1954);³ cf. *Coolidge v. New Hampshire*, *supra*.

The early hour cannot be considered a coercive factor. Cf. *People v. Kennedy*, 256 Cal.App.2d 755, 64 Cal.Rptr. 345 (1967) (2:00 a.m.). The road where the stop was effected was peopled with twice as many suspects as officers. Since Bustamonte and his friends outnumbered the police six to three, the number of officers could hardly be coercive. The occupants of the Ford were not "questioned" regarding any crime, but merely asked to furnish a driver's license or identification. The traffic citation was issued to Gonzales, not Alcalá.

Here there was no "dramatic excitement of drawn guns," or arrest preceding consent. *Wren v. United States*, 352 F.2d 617, 619 (10th Cir. 1965). "The circumstances of the investigation by the police presents

³This line of reasoning seems to have led federal courts to distrust and disfavor consensual searches. However, "one may question a logic which fails to consider that aspect of human nature which leads one person to believe he may bluff or beguile another." *People v. Linke*, 265 Cal.App.2d 297, 306, 71 Cal.Rptr. 371, 376 (1968).

[sic] a calm, routine performance of duty by the officers. There is no evidence of any threats on the part of the officers or the use of any other means from which duress or coercion could be inferred." *Id.* at 620.

Alcala's expression of consent was specific, unequivocal, and affirmative. It was more than assent, it was an invitation. The atmosphere was not coercive but "congenial." *People v. Bustamonte*, 270 Cal.App.2d 648, at 652, 76 Cal.Rptr. at 20 (1969). Alcala's subsequent assistance during the search confirms the voluntary nature of his consent.⁴

Granting the validity of California's consent rule, there can be no question but that the state trial and appellate courts can correctly conclude that Alcala was not overawed by the badge and that his consent was free and voluntary. The Ninth Circuit appears to concede as much. The Ninth Circuit was obliged under Title 28, United States Code section 2254(d) and *Ker v. California*, *supra*, to respect that finding.

Finally, the decision below must be overturned because of the palpable injustice of imposing on California a waiver standard inconsistent with the more liberal approach the Ninth Circuit has taken in reviewing federal convictions. See *United States v. Novick*, *supra*; *United States v. Wilson*, *supra*; *United States v. Noa*, *supra*.

⁴Gonzales testified that Alcala opened the trunk. Appendix p. 52.

II

THIS COURT SHOULD HOLD THAT CLAIMS BASED ON THE EXCLUSIONARY RULE SHOULD NOT BE AVAILABLE TO STATE PRISONERS SEEKING TO SET ASIDE THEIR CONVICTIONS ON FEDERAL HABEAS CORPUS.

In our petition for certiorari in this case, we requested the Court to reexamine *Kaufman v. United States*, 394 U.S. 217 (1969), as well as those decisions in which the Court has applied the exclusionary rule in state habeas corpus cases. *Whitely v. Warden*, 401 U.S. 560 (1971); *Harris v. Nelson*, 394 U.S. 286 (1969); *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Warden v. Hayden*, 387 U.S. 294 (1967). This Court has accepted that invitation. We now request that these cases be overruled.

The essence of our position is that the advantages of applying the exclusionary rule on collateral attack of state convictions are upon analysis illusory, and the disadvantages in persisting in that practice are in fact overwhelming. We ask the Court to adopt here a balancing test comparable to that used in *Harris v. New York*, 401 U.S. 222 (1971). In that case, which involved the admissibility for purposes of impeachment of a statement taken in violation of the *Miranda* rule, the Court weighed the deterrent effect of total exclusion of the impeaching evidence, against the compelling policy in favor of admission of such evidence as an aid to the truth-determining process, the very purpose of a criminal trial:

“The impeachment process here undoubtedly provided valuable aid to the jury in assessing

petitioner's credibility and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on prescribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.* at 225.

The same approach should be applied to the question of whether Fourth Amendment claims should be considered on federal habeas corpus. Taking first the deterrent side of the balance, one must ask whether the availability of federal collateral attack to review the merits of state search and seizure questions adds substantially to the deterrent effect of the exclusionary rule. Prestigious authorities have said it does not. Former California Chief Justice Roger Traynor put the matter thusly:

"The purpose of the exclusionary rule is not to prevent the conviction of the innocent, but to deter unconstitutional methods of law enforcement. [Citations.] That purpose is adequately served when a state provides an orderly procedure for raising the question of illegally obtained evidence at or before trial and on appeal. The risk that the deterrent effect of the rule will be compromised by an occasional erroneous decision refusing to apply it is far outweighed by the disruption of the orderly administration of justice that would ensue if the issue could be relitigated over and over again on collateral attack." *In re Sterling*, 63 Cal.2d 486, 487-488, 47 Cal. Rptr. 205,

207, 407 P.2d 5, 7 (1965), quoting *In re Harris*, 56 Cal.2d 879, 883-884, 16 Cal.Rptr. 889, 892, 366 P.2d 305, 308 (1961). See also, *Amsterdam, Search, Seizure and Section 2255*, 112 U. PA. L. REV. 378, 389-390 (1964).

Moreover, since the decision in *Kaufman*, considerable research has been conducted into the actual deterrent effect of the exclusionary rule. D. Oakes, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). At the conclusion of his article, Professor Oakes states in part as follows:

"As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution. What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police. The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task." *Id.* at 755.

If, as Professor Oakes concludes, the deterrent effect of the exclusionary rule as applied by state trial courts is at best speculative, what then can be said about its

application by the federal courts to review state decisions long since final? About the only justification that can be advanced for such a practice was that stated by the five-man majority in *Kaufman v. United States, supra*, as follows: "The availability of post-conviction relief serves significantly to secure the integrity of proceedings at or before trial and on appeal. . . . Collateral relief, unlike retroactive relief, contributes to the present vitality of all constitutional rights whether or not they bear on the integrity of the fact-finding process." *Id.* at 229.

However, we respectfully submit that this argument misses the point; the integrity of the judicial process is preserved by those decisions of this Court which have guaranteed every state criminal defendant adequate process for both the litigation at trial and review on appeal of federal questions in the state courts.

State criminal defendants are now entitled to counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963); confrontation of witnesses, *Pointer v. Texas*, 380 U.S. 400 (1965); definitive rulings by trial judges on objections to the admissibility of confessions, *Jackson v. Denno*, 378 U.S. 368 (1964); *Sims v. Georgia*, 385 U.S. 538 (1967); and, where the state provides appellate review in criminal cases, the right to a free transcript of the trial proceedings or its equivalent for review on appeal, *Griffin v. Illinois*, 351 U.S. 12 (1956); *Draper v. Washington*, 372 U.S. 487 (1963); and the right to counsel on appeal, *Douglas v. California*, 372 U.S. 353 (1963), serving in the capacity of an advocate, *Anders v. California*, 386 U.S. 738

(1967). The requirements that have been imposed by this Court guarantee procedures in the state courts which are calculated to reach a just resolution of any any material issue a defendant may seek to raise. The integrity of state court procedures is best served by guaranteeing procedural fairness, rather than the constant litigation and relitigation of the merits of factual issues years after the events in question.

The only way in which the *Kaufman* rule can be justified is if the interest of the states in maintaining the finality of criminal judgments is totally disregarded. However, the public interest in the finality of criminal convictions is substantial. *McMann v. Richardson*, 397 U.S. 759, 774 (1970). Never has the imperative of finality in the administration of criminal justice been better explained than it was by Professor Paul M. Bator in his definitive article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). Professor Bator there pointed out the many undesirable results of undermining the finality of criminal judgments by allowing the relitigation of contested factual issues. Such relitigation undermines public confidence in the administration of criminal justice, tends to demoralize state trial and appellate judges, and saps the criminal law of its deterrent effect by clouding the certainty of punishment even after a judgment has been affirmed on appeal. Moreover it is totally at odds with any idea of rehabilitating criminal offenders. In Professor Bator's words, "the idea of just condemnation lies at the heart of the criminal law, and we should

not lightly create processes which implicitly belie its possibility." *Id.* at 452.

Moreover, the disadvantages of relitigating the merits of Fourth Amendment claims on federal habeas corpus are compounded by reason of the fact that questions pertaining to search and seizure are among the most difficult and complex to be encountered in the criminal law. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Because of this complexity and uncertainty decisions on these issues are unpredictable. This unpredictability increases the possibility that a persistent litigant, such as Bustamonte, will eventually find a judge who agrees with his view of the exclusionary rule. Bustamonte had failed to persuade one state trial judge, ten state appellate judges, and one United States District Court judge before a three-judge panel of the Ninth Circuit agreed with his position. Clearly, in these days of crowded court dockets adherence to *Kaufman* retains "a burden on the judiciary and on society at large, which results in no legitimate benefit to the [habeas] petitioner and does nothing to serve the interest of justice." *Kaufman v. United States*, *supra*, 394 U.S. at 243 (dissenting opinion of Mr. Justice Harlan).

CONCLUSION

Petitioner respectfully requests this Court to remand the case to the Ninth Circuit Court of Appeals with directions to vacate its opinion and to affirm the order of the District Court denying Bustamonte's petition for the writ of habeas corpus.

Dated, April 17, 1972.

EVELLE J. YOUNGER,

Attorney General of the State of California,

HERBERT L. ASHBY,

Chief Assistant Attorney General—

Criminal Division,

DORIS H. MAIER,

Assistant Attorney General—Writs Section,

EDWARD P. O'BRIEN,

Deputy Attorney General,

ROBERT R. GRANUCCI,

Deputy Attorney General,

Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Case No. 71-732

MERLE R. SCHNECKLOTH, Superintendent, California
Conservation Center,

Petitioner,

VS.

ROBERT CLYDE BUSTAMONTE,

Respondent.

(On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit)

BRIEF OF THE STATE OF ILLINOIS AND OF THE
AMERICANS FOR EFFECTIVE LAW ENFORCE-
MENT AS AMICI CURIAE ON BEHALF OF
THE PETITIONER

INTEREST OF THE *AMICI CURIAE*

The scope of relief available to state prisoners under Title 28 U.S.C. § 2241 is of vital concern to each of the states since it is they who bear the primary responsibility for enforcement of the criminal process in this country. With the broadening category of issues cognizable by way of federal habeas corpus, the crucial element of finality of state criminal convictions has been lost. The federal habeas courts presently act as courts of review of state criminal proceedings and readily redetermine the substantive merits of issues which have been fully and fairly litigated in the state courts and which have ~~no bearing~~ on the legality of the detention from which relief is sought.

This procedure has resulted in an ever increasing number of federal petitions attacking virtually every aspect of state criminal proceedings and has totally subverted the original purposes of the writ of habeas corpus along with the concept that a criminal judgment at some point must become final in order to serve society's interest in enforcing its criminal laws.

The State of Illinois has a particular interest in this case since Illinois criminal convictions are being subjected to a constantly increasing attack in the federal courts. Within the three year period 1969-1971, approximately 550 petitions for writs of habeas corpus have been filed in the federal courts attacking the validity of Illinois criminal convictions.

Accordingly, the State of Illinois, with the sponsorship of its Attorney General, offers this brief in support of the petitioner's argument that the scope of relief available

to state prisoners by way of federal habeas corpus should be limited to exclude claimed violations of the exclusionary rule.* The State of Illinois is joined in this brief by the Americans For Effective Law Enforcement.

Americans For Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. AELE has received a tax exempt ruling from the Internal Revenue Service as an educational corporation. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

AELE believes that one of the most effective means of accomplishing these purposes is through the filing of briefs *amicus curiae* in cases of crucial significance with regard to the enforcement of the criminal law. In its *amicus* advocacy AELE seeks to represent the concern of the average citizen with the problems of crime and lawlessness in this country and to represent the desire of the

* The State of Illinois also has an interest in the determination of the issue concerning the validity of the consent to search and adheres to the petitioner's treatment of the issue.

vast majority of our citizens for effective law enforcement, commensurate with the protection of the rights of individuals. We further seek to articulate to the courts the very real practical problems which confront law enforcement officers in order that the courts may weigh such problems in deciding cases which will have a vital impact on the effectiveness of the law enforcement process as a whole.

THE SCOPE OF RELIEF AVAILABLE TO STATE PRISONERS BY WAY OF FEDERAL HABEAS CORPUS SHOULD BE LIMITED TO EXCLUDE CLAIMS OF UNREASONABLE SEARCHES AND SEIZURES.

Prior decisions of this Court have found the remedy of federal habeas corpus to be available to state prisoners alleging that evidence obtained in violation of the Fourth Amendment was admitted against them at trial. *Kaufman v. United States*, 394 U.S. 217 (1969); *Mançusi v. DeForte*, 392 U.S. 364 (1968); *Carafas v. La Vallee*, 391 U.S. 234 (1968); *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967). This finding should be reconsidered by this Court and reversed. Neither the historical function of the writ of habeas corpus at common law, nor the present statute conferring jurisdiction upon federal courts to issue the writ requires the conclusion that state prisoners must be allowed to raise and adjudicate anew alleged violations of the exclusionary rule which have been fully considered and determined in the state courts. The Constitution certainly does not require it and there are sound legal and policy reasons supporting the foreclosure of this avenue of collateral attack to prisoners in custody pursuant to convictions in the courts of a state.

The federal Constitution provides only that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, sect. 9. The term "habeas corpus" is not defined nor is the scope of the remedy available in any way delimited by the Constitution. The first statutory enactment authorizing the federal courts to issue the writ was the Judiciary Act of 1789, 1 Stat. 81 (1789) which stated only that the courts of the United States "shall have power to issue writs of . . . habeas corpus . . .". Again, the substantive effect of this authorization was undefined.

This Court thus was compelled to look beyond the constitutional and statutory provisions to the common law to determine the function and scope of the writ of habeas corpus at the time the term was incorporated in the federal Constitution. *Ex parte Ballman*, 8 U.S. 75 (1807); *Ex parte Kearney*, 20 U.S. 38 (1822); *Ex parte Watkins*, 28 U.S. 193 (1830). At common law, the writ was not available to persons convicted of an offense by a court of competent jurisdiction, but rather served as a protection against illegal restraint by requiring that an accused either be charged or released.² Habeas corpus never performed the function of a writ of error to review questions of law or fact which had been distinct-

1. This statute authorized issuance of the writ only to those persons in custody pursuant to federal judgment. The federal courts had no authority to grant the writ to persons in custody pursuant to state law until 1867.

2. See 31 Car. II, C. 2, § 6 (1679) for the statutory enactment of the functions of the writ at common law which was in force in England at the time the federal Constitution included the term "habeas corpus".

ly placed in issue and determined by a court of competent jurisdiction. *Ex parte Watkins, supra*.

Consistently with these principles, this Court interpreted the Judiciary Act of 1789 to preclude consideration on habeas corpus of issues of fact or law which had been determined by the trial court having jurisdiction even though such issues might have been decided erroneously. *Ex parte Watkins*, 28 U.S. at 202.

This principle was broadened in two respects by subsequent decisions. First, this Court found habeas corpus available to consider claims that the sentence imposed by the trial court was illegal. *Ex parte Lange*, 85 U.S. 163 (1873); *Ex parte Wilson*, 114 U.S. 417 (1885); *In re Snow*, 120 U.S. 274 (1887); and *Nielsen, Petitioner*, 131 U.S. 176 (1889). Second, claims of unconstitutionality relating to the statute creating the offense of which the petitioner was convicted could be tested collaterally by habeas corpus. This latter practice was based upon the premise that a conviction under an unconstitutional statute was void and precluded the trial court from ever acquiring jurisdiction over the cause. *Ex parte Siebold*, 100 U.S. 371 (1879). But see *Ex parte Parks*, 93 U.S. 18 (1876) and *Ex parte Yarbrough*, 110 U.S. 651 (1884) precluding consideration on habeas corpus of claims that the indictment pursuant to which the petitioner was tried failed to state an offense.

During this period of expansion of the scope of the writ, federal criminal convictions generally were not reviewable by appeal. See Hart and Wechsler, *The Federal Courts and the Federal System*, 1313-17 (1953). Significantly, with the expansion of the right to appeal in federal criminal cases came a restriction on the availability of the writ of habeas corpus. Repudiating *Siebold, supra*,

this Court held that issues relating to the constitutionality of the statute creating the offense were properly determined by appeal rather than by application for habeas corpus relief. See *Salinger v. Loisel*, 265 U.S. 224 (1924). However, even under this Court's relatively expansive reading of the availability of the writ, it was never utilized to review determinations of fact or of law made by courts of competent jurisdiction and upon which a criminal conviction was based. The writ never served the function of a writ of error.

The Habeas Corpus Act of 1867 first extended the availability of the writ of habeas corpus to persons detained pursuant to state authority. In relevant part, the Act conferred upon the federal courts the power to issue the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States". Through an erroneous interpretation of the legislative intent in promulgating this Act and through an overbroad reading of the early cases decided under it, this Court has reached the conclusion that the statute conferred upon the federal courts jurisdiction to reconsider and re-determine all constitutional questions involved in state criminal litigation. There is no expressed legislative intent supportive of such a conclusion. And further, the early cases decided under this statute clearly adhered to the pre-existing limitations on the availability of the writ. It is only from an expansive reading of some of the broad language of these opinions that the present scope of issues reviewable on habeas corpus has evolved. See *Rowe v. Peyton*, 383 F. 2d 709, 716 (4th Cir. 1967) *affm'd. Peyton v. Rowe*, 391 U.S. 54 (1968).

The legislative history of the 1867 Act utterly fails to establish that Congress intended to extend the scope of

federal habeas corpus to allow review of all federal questions raised in either state or federal criminal cases.³ As Professor Bator notes in his article "Finality in Criminal Law", 76 Harv. L. Rev. 441, 475-77 (1963):

"The strikingly sparse legislative history does not seem to me to furnish such evidence. The act of 1867 received only the most perfunctory attention and consideration in the Congress; indeed, there were complaints that its effect could not be understood at all. Neither house made any inquiry into the scope or purposes of review to be afforded on habeas corpus. And there is no indication whatever that the bill intended to change the general nature of the classical habeas jurisdiction: that is, that it intended to expand the classes or categories of questions which were thought to be appropriately tested on collateral attack". (footnotes omitted)

Likewise, Judge Wyzanski reflected in *Geagan v. Gavin*, 181 F. Supp. 466, 468, (Mass. 1960), *aff'd*. 292 F. 2d 244 (1st Cir. 1961), *cert. den.* 370 U.S. 903 (1962):

"Congress did not use language, and there was nothing in the avowed purpose of legislative history of the 1867 statute, which compelled the Supreme Court of the United States to interpret the statute as conferring upon United States District Judges authority to inquire whether a state court judgment by a jurisdictionally competent court rested upon any procedural step or substantive ruling involving a violation of the United States Constitution".

3. The focus of the Act was the addition of a new class of persons to whom the writ would be available. It was not an expansion of the substantive scope of the writ. See *Fay v. Noia*, 372 U.S. 391, 448, 453 (1963) (Mr. Justice Harlan, dissenting).

And indeed, this Court initially agreed that the Act did not have the effect of extending federal authority to reconsider determinations of federal constitutional questions unrelated to the jurisdiction of the trial court. Each of the early cases decided by this Court involving the application of the statute to state detentions involved issues relating to the jurisdiction of the trial court which were properly amenable to collateral attack prior to the adoption of the 1867 statute. See *Ex parte Royall*, 117 U.S. 241 (1886) (constitutionality of statute);⁴ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (constitutionality of statute); *In re Rahrer*, 140 U.S. 545 (1891) (constitutionality of statute); *Crowley v. Christianson*, 137 U.S. 86 (1890) (constitutionality of statute); *In re Frederick*, 149 U.S. 70 (1893) (constitutionality of statute); *McElvaine v. Brush*, 142 U.S. 155 (1891) (constitutionality of statute).

In fact, this Court affirmatively held that the Habeas Corpus Act of 1867 did not empower the federal courts to redetermine non-jurisdictional issues arising under the Constitution. *Wood v. Brush*, 140 U.S. 278 (1891). In *Wood*, the petitioner sought relief by federal habeas corpus from a New York murder conviction upon the allegation that both the grand and petit jury in his case had

4. Even as to jurisdictional issues, this Court required the exhaustion of state remedies including the writ of error to this Court, *In re Frederick*, 149 U.S. 70 (1893); *Darr v. Burford*, 339 U.S. 200 (1950); before the judgment of a state court could be collaterally attacked on federal habeas corpus. Thus, the state courts were given the opportunity to decide in the first instance all questions of fact and law including those which the federal court had the power to determine by way of habeas corpus.

been selected in a racially discriminatory manner. Affirming the denial of habeas corpus relief by the lower federal court, Mr. Justice Harlan stated:

"Whether the grand jurors who found the indictment and the petit jurors who tried the appellant were or were not selected in conformity with the laws of New York—which laws, we have seen, are not obnoxious to the objection that they discriminate against citizens of the African race because of their race—was a question which the trial court was entirely competent to decide, and its determination could not be reviewed by the circuit court of the United States, upon a writ of habeas corpus, without making that writ serve the purposes of a writ of error. No such authority is given to the circuit courts of the United States by the statutes defining and regulating their jurisdiction. It often occurs in the progress of a criminal trial in a state court, proceeding under a statute not repugnant to the constitution of the United States, that questions occur which involve the construction of that instrument and the determination of rights asserted under it. But that does not justify an interference with its proceedings by a circuit court of the United States upon a writ of habeas corpus sued out by the accused either during or after the trial in the state court, for "upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them"; and, "if they fail therein, and withhold or deny rights, privileges, or immunities secured by the constitution and laws of the United States the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this court for final and conclusive determination . . . The statute under

which the appellant was prosecuted is not repugnant to the constitution of the United States, and the court that tried him, we repeat, was competent to guard and enforce every right secured to him by that instrument, and which might be involved in his trial.

The petition for the writ sets forth no ground affecting its jurisdiction either of the offense charged or of the person alleged to have committed it. If the question of the exclusion of citizens of the African race from the lists of grand and petit jurors had been made during the trial in the court of general sessions, and erroneously decided against the appellant, such error in decision would not have made the judgment of conviction void, or his detention under it illegal. Nor would that error, of itself, have authorized the circuit court of the United States, upon writ of habeas corpus, to review the decision or disturb the custody of the accused by the state authorities. The remedy, in such case, for the accused, was to sue out a writ of error from this court to the highest court of the state having cognizance of the matter, whose judgment, if adverse to him in respect to any right, privilege, or immunity, specially claimed under the constitution or laws of the United States, could have been re-examined, and reversed, affirmed, or modified by this court as the law required". (140 U.S. 278, 11 S. Ct. 738, 741-42) (citations omitted).

These principles were accepted and followed by this Court in subsequent decisions. *In re Jugiuro*, 140 U.S. 291 (1891) (denying authority of federal courts on habeas corpus to decide issues of competency of counsel and discriminatory jury selection); *Andrews v. Swartz*, 156 U.S. 272 (1895) (discriminatory jury selection); *Bergemann v. Backer*, 157 U.S. 655 (1895); *In re Eckart*, 166 U.S. 481 (1897) (method of returning jury verdicts).

Prior to *Brown v. Allen*, 344 U.S. 443 (1963), this Court consistently adhered to the view that the Act of

1867 had not expanded the substantive scope of habeas corpus but had only added to the class of persons to whom the writ was available. This Court never interpreted the Act as allowing federal collateral attack of all constitutional questions raised in a state criminal trial. The vitality of the rule that only those questions relating to the jurisdiction of the trial court to act were properly before the federal courts on habeas corpus remained intact.

The only dimension added to the concept of habeas corpus during this period dealt with the power of the federal courts to intervene in those cases in which the state court procedures were ineffective to fairly determine the constitutional claim being presented. In *Frank v. Mangum*, 237 U.S. 309 (1915) a state prisoner alleged in the state courts that his murder trial had been mob-dominated. On review in the state supreme court, that court considered the trial court record and additional, extensive affidavits and reached the conclusion that the claim had not been established. A writ of error was denied by the Supreme Court of the United States.

The prisoner requested relief by federal habeas corpus, alleging that he had been convicted in violation of due process of law. In affirming the denial of habeas corpus, this Court noted that if in fact, the prisoner had been convicted by a mob-dominated court and the state supplied no corrective process, he would have been denied due process of law. However, the Court continued that if the state supplies such corrective process (in that case a motion for new trial with the right to appeal therefrom) even though the final state determination of the substantive issue may be erroneous, the requirements of

due process have been met.⁵ The federal courts may not substitute their judgment for that of the state court or understate any general review of the state proceedings. The Court concluded:

"we hold that such a determination of the facts as was thus made by the court of last resort of Georgia respecting the alleged interference with the trial through disorder and manifestation of hostile sentiment cannot, in this collateral inquiry, be treated as a nullity, but must be taken as setting forth the truth of the matter; certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and that the mere assertion by the prisoner that the facts of the matter are other than the state court, upon full investigation determined them to be, will not be deemed sufficient to raise an issue respecting the correctness of that determination". (237 U.S. 309, 35 S. Ct. 582, 590)."

5. For cases in which this Court found the state procedures to be inadequate to test the federal claim being asserted, see *Moore v. Dempsey*, 261 U.S. 86 (1923); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Ex parte Hawk*, 321 U.S. 114 (1944); *White v. Ragen*, 324 U.S. 760 (1945); *Woods v. Nierstheimer*, 328 U.S. 211 (1946); *Jennings v. Illinois*, 342 U.S. 104 (1951); *Daniels v. Allen*, 344 U.S. 443 (1953).

The same principle also was applied to federal prisoners. The writ thus was available to persons under federal detention to test issues which otherwise could not have been adequately considered by the courts. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Walker v. Johnston*, 312 U.S. 275 (1941); *Waley v. Johnston*, 316 U.S. 101 (1942).

6. Frank raised an additional issue relating to his involuntary absence from the courtroom at the rendition

Thus, prior to *Brown v. Allen*, *supra*, the substantive scope of federal habeas corpus available to persons under state detention was limited to claims relating to the jurisdiction of the state trial court and to constitutional issues for which the state had provided no adequate opportunity for full and fair consideration. The writ remained unavailable to consider constitutional claims which had been fully and fairly considered and decided by the state courts even though the decision reached by the state tribunal may have been erroneous.

Suddenly, in *Brown*, this Court radically expanded federal authority to issue the writ by holding that habeas corpus was available to a state prisoner alleging that the cause of his detention was an erroneous state determination of a constitutional question. This step was taken without any discussion of the authority upon which it was based and without any explanation of the reasons thought to necessitate it. Indeed the lack of discussion of such a radical expansion of the writ belies the expectation that much thought actually was given to the substantive effect of the Court's decision.

The issue in *Brown* was whether Brown's conviction was secured through the use of a coerced confession. This issue had been fully litigated in the state courts and decided adversely to Brown. This Court denied certiorari. Brown then filed a petition for federal habeas corpus upon the basis that his confession had in fact been coerced and the issue erroneously determined by the state

of the verdict. The state court had held this issue to be waived by failure to include it in the motion for new trial. This Court found the state rule requiring the issue to be raised in the motion for new trial to be a reasonable procedure comporting with due process and did not reconsider the merits of the substantive claim.

courts. Until *Brown*, such a claim clearly was not available as a basis upon which to collaterally attack a state criminal conviction on federal habeas corpus. *Wood v. Brush*, 140 U. S. 278 (1891).

Yet this Court, without any discussion of the justification for such a rule, announced that a federal court may deny the writ without conducting a hearing if the court is satisfied not only that "the state process has given fair consideration to the issues and the offered evidence", but that the state court has reached "*a satisfactory conclusion*". (344 U. S. at 463) (emphasis added). In effect, what the Court did was to hold that the statutory availability of the writ to those persons "in custody in violation of the Constitution" included those persons whose detention was based upon an erroneous, although jurisdictionally competent, determination of all questions arising under the federal constitution. This was never the function of the writ at common law nor is it consistent with the statutory authorization of the federal courts to issue the writ as that authorization had been consistently interpreted prior to *Brown*.

Regardless of the authority conferred by the fourteenth amendment and regardless of the degree to which the provisions of the first ten amendments are deemed to be incorporated therein, it must be remembered that the power to issue the writ is defined by statute. Title 28 U. S. C. § 2241. The authority of the lower federal courts necessarily is circumscribed by that statute. It is clear that at the time of the passage of the Habeas Corpus Act of 1867 (which is the antecedent of the present Title 28 U. S. C. § 2241) detention "in violation of the Constitution" meant detention pursuant to an unconstitutional statute or pursuant to a state proceeding in which

the person in custody had been deprived of any adequate opportunity to have claims of constitutional irregularities fully and fairly considered in the state courts. It did not mean detention pursuant to a state proceeding in which constitutional issues had been presented, fully considered and decided (in the opinion of a federal court judge) erroneously. Thus, for purposes of federal habeas corpus, no person in state custody pursuant to a conviction by a court of competent jurisdiction who had been given an opportunity to fully and fairly litigate all constitutional issues in the state courts, with the possibility of ultimate resort to this Court was in custody "in violation of the Constitution".

The result of the overboard reading of the statutory language by this Court in *Brown* has resulted in full review by the federal courts of all constitutional issues raised and fairly decided by state tribunals. *Irvin v. Dowd*, 359 U.S. 394 (1959). In effect, a federal court on habeas corpus now sits as a court of review over the state courts, and performs what is normally an appellate function. Not only is this result the product of an unwarranted and unauthorized judicial expansion of federal statutory authority, it is a result which is severely detrimental in its effect on the administration of criminal justice in this country.

The state and federal judiciaries are equally subservient to the federal constitution. Both are equally charged with the responsibility of zealously guarding the constitutional rights of every litigant. Yet, after a full and fair determination of issues arising under the Constitution by a state trial judge and by several state appellate judges and after a denial of relief by this Court, these same issues are now fully reviewable by one dis-

trict judge on a petition for federal habeas corpus. Not only does this procedure undermine the very integrity of the state determination and significantly debilitate the authority of the state judiciary, it introduces a total lack of finality to state criminal convictions. Such an absence of finality is detrimental to the efficient functioning of both state and federal courts and even more significantly is detrimental to the person under state detention.

The most effective deterrent to crime is the imposition of punishment which is certain and immediate. The expanded nature of federal habeas corpus has destroyed both the certainty and the immediacy of punishment. The prisoner, although serving a sentence, no longer accepts the fact of his conviction and the necessity of constructively serving the sentence imposed. Rather, the inmate's energies are focused toward convincing the federal court of the invalidity of his conviction. This effect is readily apparent from the greatly increased numbers of habeas petitions being filed since *Brown*.⁷

The person in custody does not have to accept the idea that he is being punished and that such punishment has been justly imposed. He may file successive petitions for relief in the federal courts. He is never forced to focus his energies in the direction of any programs for educa-

7. The situation has been worsened by decisions subsequent to *Brown* and *Irvin* which have relaxed or totally obliterated the procedural requirement of exhaustion of available state remedies and undermined the principle that an independent and adequate state basis for the conviction would support the judgment despite an erroneous determination of a federal constitutional claim. See *Fay v. Noia*, 372 U.S. 391 (1963); *Jackson v. Denno*, 378 U.S. 368 (1964).

tion and rehabilitation provided by the institution to which he has been committed. Even if he is never successful in the federal court, the time spent upon commitment for a criminal offense has not served any of the purposes of punishment: the confinement does not serve as a deterrent for future criminal conduct by the individual since he has never accepted the fact that he is being justly punished; the prison has been unable to make significant inroads toward rehabilitation through education or technical training because the inmate's attention and concern have been focused upon obtaining federal relief which in all probability will result in his complete freedom from confinement.⁸

The instant case provides perhaps the best example of the basic unsoundness of allowing federal habeas courts to act as courts of review in determining constitutional issues raised and decided in state proceedings.

Bustamonte was arrested on January 31, 1967, at which time the automobile search was conducted which is now alleged to have been unreasonable. Following a full hearing, including the testimony and cross examination of witnesses, the state trial judge denied the motion to suppress. Respondent was convicted on April 21, 1967, of possession of a completed check with intent to defraud. On appeal, the California Court of Appeal reconsidered Bustamonte's allegation that the search and seizure vio-

8. In most cases, by the time a case reaches and proceeds through the federal courts after full state appellate and/or post conviction litigation has been completed, the state will be precluded from retrying a successful petitioner due to the lapse of time and the unavailability of witnesses.

lated the fourth amendment and rejected the claim. The California Supreme Court denied a petition for leave to appeal on May 8, 1969. Bustamonte did not petition this Court for a writ of certiorari.

Respondent filed a petition for federal habeas corpus relief on February 10, 1970. He again alleged as grounds for issuance of the writ that the search of January 31, 1967 was unreasonable and thus violated the fourth amendment. The district judge denied the writ and Bustamonte appealed. On September 13, 1971, the Court of Appeals for the Ninth Circuit vacated the District Court order denying the writ and remanded the case for further proceedings on the basis that the California courts applied an improper standard in determining whether the consent to search was valid.

Thus, three years and five months after his conviction and following a consideration and rejection of the illegal search and seizure claim by eleven state and one federal judge, Bustamonte finally found in the Court of Appeals for the Ninth Circuit a judicial tribunal which appears to have agreed with his claim that the fourth amendment issue had been erroneously decided by twelve other judges. This finding, as with any determination made by a trial court or by a court of review is not necessarily correct. It is merely the most recent determination of the issue.

Issues concerning the reasonableness of searches and seizures are among the most difficult in the law. They are highly subject to inconsistent resolution. And once the issue is resolved, the consequence of a fourth amendment violation is the total exclusion at trial of evidence produced by the search. *Mapp v. Ohio*, 367 U.S. 643 (1961).

The efficacy of the exclusionary rule itself is highly questionable. The stated purpose of the rule is to deter illegal police conduct. *Linkletter v. Walker*, 381 U.S. 618, 636-37 (1965). Completely trustworthy evidence thus is suppressed in the hope that police misconduct will be discouraged.

Experience with the rule, however, reflects that "it is both conceptually sterile and practically ineffective in accomplishing its stated objective". *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Mr. Chief Justice Burger, dissenting). See also Oaks, "Studying The Exclusionary Rule in Search and Seizure", 37 U. Chi. L. Rev. 665 (1970).

There are several reasons for the practical failure of the rule. First, it imposes no direct sanction on the individual police officer although it is his misconduct which the rule seeks to deter. Rather, the prosecutor is the person directly affected, and he normally has no control or authority over police practices.

Second, enforcement of the exclusionary rule has not educated the police in the sense of establishing working rules as to what conduct is in fact prohibited. This is due in part to the disinclination of policemen to read appellate court opinions and to their lack of training in interpreting judicial guidelines set forth in cases in which the issues are difficult and their resolutions highly controversial. The problem is compounded by the lengthy time lag between the original police conduct and the ultimate determination of the legal issue.

Third, and most significantly, any deterrent value is substantially minimized because the benefits of the rule are available only to those persons charged with a crime.

Thus, a large proportion of day-to-day police work is completely unaffected by the existence of the exclusionary rule.

This lack of effectiveness in practice glaringly highlights the inappropriateness of application of the exclusionary principle to fourth amendment claims. Unlike other areas in which the doctrine of suppression is applied, an illegal seizure has no effect upon the trustworthiness of the seized evidence. Often such evidence alone conclusively establishes a defendant's guilt. And further, the admission of such evidence in no way impugns the basic fairness of the trial. See *Linkletter v. Walker*, *supra*, at 639. Yet once the search and seizure is found to be unreasonable, regardless of whether the police error is flagrant and intentional or minor and inadvertent, the exclusionary rule operates to render the evidence totally inadmissible. Compare *Irvine v. California*, 347 U.S. 128 (1954) and *Miller v. United States*, 357 U.S. 301 (1958). As this Court noted in *Irvine*:

"Rejection of the evidence does nothing to punish the wrongdoing official, while it may, and likely will, release the wrongdoing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches". (347 U.S. 128, 136).

Society pays a high price indeed for rigid judicial adherence to a formalistic procedure which is theoretically inappropriate and which utterly fails to fulfill in practice its expressed purpose.

The basic deficiencies of the fourth amendment suppression doctrine are only compounded by decisions sub-

sequent to *Brown v. Allen, supra*, allowing claimed exclusionary rule violations as a basis for collateral attack of an otherwise final state criminal conviction by way of federal habeas corpus. The direct application of the rule to state criminal proceedings as required by *Mapp v. Ohio, supra*, is theoretically unwise and practically ineffective. Allowing the rule to serve as a basis for collateral attack serves no purpose at all.

Mr. Justice Black's comments in dissent from the holding that exclusionary rule violations may be raised by federal prisoners to collaterally attack a criminal conviction in a post conviction proceeding under Title 28 U. S. C. § 2255 are equally applicable in this case. *Kaufman v. United States*, 394 U. S. 217, 231 (1969). Acknowledging that the sole purpose of the exclusionary rule is to deter police misconduct, Mr. Justice Black continues:

"How this purpose can be served by the broad and unqualified rule adopted by the Court today is something of a mystery. Of course, the shortcomings inherent in any human system make it impossible to eliminate entirely all the incentives to conduct an illegal search. It would seem rather fanciful, however, to suggest that these inevitable incentives would be decreased to any significant extent by the fact that if a conviction is obtained after adequate opportunities have been provided to litigate constitutional claims, and if this conviction is upheld by all the reviewing courts, the validity of the search and seizure may later be questioned in a collateral proceeding. Understandably, the Court does not make any such suggestion and indeed makes no effort to justify its result in terms of the long-recognized deterrent purpose of the exclusionary rule". (394 U. S. at 238-39).

Thus, apart from any basic impropriety in the exclusionary rule itself, its basic purpose is not fostered by the use

of the rule as a ground for federal habeas corpus relief. Similar claims unrelated to the basic integrity of the fact finding process were never cognizable in federal habeas corpus proceedings prior to *Brown v. Allen*. They should not be now.

While much of the rhetoric characterizing the writ of habeas corpus as the ultimate protector of fundamental liberty and the most basic safeguard against illegal restraint is true, it must also be remembered that "the writ has potentialities for evil as well as for good". *Brown v. Allen*, 344 U.S. 443, 488 (1953) (Mr. Justice Frankfurter, dissenting).

We have such an example of the writ's "potential for evil" in the instant case. Resulting from an overbroad judicial expansion of federal authority to issue the writ, the federal courts now are redetermining the substantive merit of claimed exclusionary rule violations which have been fully litigated and decided by the state courts. Even assuming that the conclusion reached herein by eleven state judges regarding the merits of the claim is erroneous, a full and fair determination of the issue, although erroneous, does not render the state detention illegal or in violation of the Constitution. The federal courts thus have no statutory authority to consider the allegation anew upon a petition for federal habeas corpus.

A judicial expansion of authority is most inappropriate in a case where the expanded authority is utilized to consider state applications of the exclusionary rule—a rule which is ineffective to accomplish its stated objectives during the course of direct litigation of fourth amendment issues having no relation to the basic integrity of the factfinding process at trial or even to the issue of the guilt or innocence of the person under deten-

tion. This Court therefore should exclude claimed exclusionary rule violations which have been fully litigated and decided in the state courts from collateral reconsideration under Title 28 U.S.C. § 2241.

CONCLUSION

For the foregoing reasons, the State of Illinois and the Americans for Effective Law Enforcement as *amici curiae* on behalf of the petitioner herein, respectfully request this Court to remand this case to the Court of Appeals for the Ninth Circuit with directions to vacate its opinion and to affirm the judgment of the District Court.

Respectfully submitted,

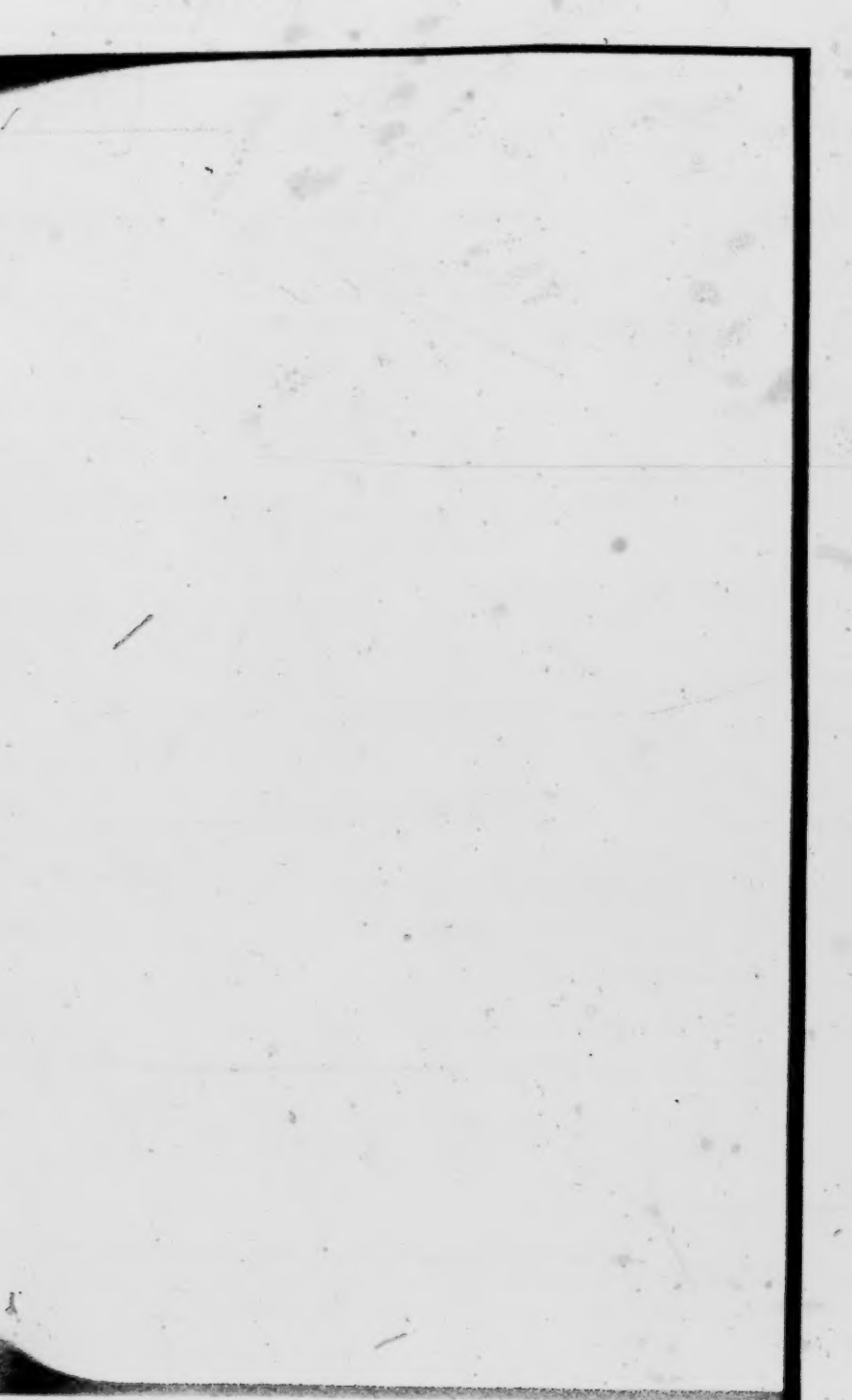
WILLIAM J. SCOTT,
Attorney General,
State of Illinois,

JAMES B. ZAGEL,
Assistant Attorney General,
188 W. Randolph St. (Suite 2200),
Chicago, Illinois 60601,
312-793-2570, 2571,

Attorneys for Amici Curiae

FRED INBAU,
Professor of Law,
Northwestern University,
Chicago, Illinois 60611,

JAYNE A. CARR,
Assistant Attorney General,
Of Counsel.



Sup. Ct. of the U. S.

JUN 16 1972

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-732

MERLE R. SCHNECKLOTH, Superintendent,
California Conservation Center,

Petitioner,

v.

ROBERT CLYDE BUSTAMONTE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

STUART P. TOBISMAN
S. THOMAS POLLACK
611 West Sixth Street
Room 3600
Los Angeles, California 90017

Attorneys for Respondent

DONALD M. WESSLING

(i)

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-732

MERLE R. SCHNECKLOTH, Superintendent,
California Conservation Center,

Petitioner,

v.

ROBERT CLYDE BUSTAMONTE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

INTRODUCTION

For purposes of this brief, respondent hereby adopts the material in the petitioner's brief under the following headings: "OPINION BELOW," "JURISDICTION," and "STATEMENT OF THE CASE."

QUESTIONS PRESENTED

1. Must verbal expression of consent in response to a police request to search an automobile be substantiated by demonstration that consent was given with knowledge that it could be withheld?

2. Should federal habeas corpus be available to state prisoners seeking to set aside their convictions by raising search and seizure issues?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourth Amendment and Section 1 of the Fourteenth Amendment, U.S. Const.; The Habeas Corpus Act of 1867 (Act. of Feb. 5, 1867, Ch. 28, § 1, 14 Stat 385); 28 U.S.C. § 1257; and 28 U.S.C. § 2254. These provisions are reprinted in Appendix A, *infra*.

SUMMARY OF ARGUMENT

The two issues presented in this case go to the very heart of our system of criminal procedure. This Court has long held that an essential element of a waiver of constitutional rights is whether the individual knew he was relinquishing such rights. Without such knowledge, the individual could not be deemed to have made a meaningful decision to forego his constitutional protections. California has sought to establish a rule to the effect that an inquiry into whether knowledge of the constitutional right was present is irrelevant when an individual "consents" to a warrantless search, thereby relinquishing his Fourth Amendment right to resist the

search. This rule is contrary to the fundamental constitutional criteria announced by this Court to which all other courts must adhere, and should be held unconstitutional.

The second issue is whether exclusionary rule questions should be cognizable on federal habeas corpus when raised by state prisoners. Federal habeas corpus has proven to be the most effective remedy for ensuring full implementation of fundamental constitutional protections, and it has guaranteed fair and equal treatment for all citizens seeking to raise federal constitutional claims. Three years ago this Court considered and rejected arguments aimed at limiting the availability of federal habeas corpus for federal prisoners seeking to raise exclusionary rule questions. In that decision this Court stated that such limitations are also inappropriate with respect to state prisoners. *Kaufman v. United States*, 394 U.S. 217, 225 (1969). The justification for granting to state prisoners full access to federal habeas corpus in connection with search and seizure claims is even stronger than that applicable to federal prisoners, since, unlike federal prisoners, state prisoners may not have an opportunity to have a federal court review their federal constitutional claims until a petition for federal habeas corpus has been filed. The principle enunciated in *Kaufman v. United States* that state prisoners may raise search and seizure claims on federal habeas corpus has helped to guarantee consistent enforcement of the Fourth Amendment's protections, and it should be affirmed in this case.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ADMITTING ALL EVIDENCE RESULTING FROM THE SEARCH OF THE 1958 FORD WITHOUT DETERMINING WHETHER ALCALA KNEW OF HIS CONSTITUTIONAL RIGHT TO RESIST THE WARRANTLESS SEARCH**A. Introduction**

The first question before this Court is clear: Can California adopt a rule of law regarding the waiver of fundamental constitutional rights that does not meet the minimum criteria for such waivers heretofore set forth by this Court? The record discloses that, at approximately 2:40 A.M., a 1958 Ford automobile carrying Joe Alcala and five other occupants was stopped by a police car. Later, after two additional police cars arrived on the scene, a police officer asked Alcala if he could search the Ford. Alcala was not advised that he could refuse to permit the search, nor was any evidence introduced at the trial to show that Alcala had such knowledge. Rather, the California courts applied their presumption that:

"When permission is sought from a person of ordinary intelligence the very fact that consent is given . . . carries the implication that the alternative of a refusal existed." *People v. MacIntosh*, 264 Cal. App. 2d 701, 705-06, 70 Cal. Rptr. 667 (1968).

By applying the above stated presumption, the California courts sought to make Alcala's awareness of his constitutional rights irrelevant; if he consented to the search, he was *presumed* to know that he did not have to consent. The following sections of this brief will demonstrate that such a rule is unconstitutional, and that the

Court of Appeal for the Ninth Circuit properly remanded the case to the United States District Court to determine whether Alcala knew of his constitutional right to resist the search. *Bustamonte v. Schneckloth*, 448 F.2d 699 (9th Cir. 1971).

B. The Fourth Amendment Applies To The States, And State Courts Must Apply Certain Minimum Constitutional Standards For Determining The Validity Of A Search And Seizure.

The Fourth Amendment provides that:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Through countless decisions, this Court has emphasized that the purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *See, e.g., Ker v. California*, 374 U.S. 23, 30-33 (1963); *Mapp v. Ohio*, 367 U.S. 643, 646-50 (1961); *Byars v. United States*, 273 U.S. 28, 33-34 (1927); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920); *Weeks v. United States*, 232 U.S. 383, 389-92 (1914); *Boyd v. U.S.*, 116 U.S. 616, 624-30 (1886). As this Court stated in *Gould v. United States*, 255 U.S. 298, 303-04 (1921):

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court [citing cases] have declared the importance to

political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. [the Fourth and Fifth]"

In *Mapp v. Ohio*, *supra*, this Court overruled its earlier decision in *Wolf v. Colorado*, 338 U.S. 25 (1949), and held that evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state courts. The Court stated that to permit such evidence to be admitted in state courts, while at the same time holding to the position that the Fourth Amendment is applicable to the states, would make the Fourth Amendment little more than an "empty promise." 367 U.S. at 660.

Two years later, in *Ker v. California*, *supra*, it was held that state court determinations of reasonableness must be consistent with federal constitutional guarantees. Although *Ker* made it clear that *Mapp* did not establish United States Supreme Court supervisory authority over the state courts; *Ker* made it equally clear that state courts must apply certain basic criteria to determine the reasonableness of searches and seizures:

"While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—i.e., constitutional—criteria established by this Court have been respected. The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforce-

ment' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain." 374 U.S. at 34.

The Fourth Amendment and the decisions of this Court both stress that the primary source of governmental authority to conduct searches and seizures must be through the obtaining of validly issued search warrants. *See, e.g., Katz v. U.S.*, 389 U.S. 347, 357 (1967); *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *Agnello v. United States*, 269 U.S. 20, 33 (1925). Last term, this Court stated that "the most basic constitutional rule in this area" is that searches conducted without prior approval by a judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only "to a few specifically established and well-delineated exceptions." These exceptions are "jealously and carefully drawn" and there must be a showing by those who seek the exception that "the exigencies of the situation make that course imperative." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) citing *Katz v. United States*, *supra*, 389 U.S. at 357; *Jones v. United States*, 357 U.S. 493, 499 (1958) and *McDonald v. United States*, 335 U.S. 451, 456 (1948). One of these "jealously and carefully drawn" exceptions to the warrant requirement has been established for instances in which an individual consents to a warrantless search, thereby waiving his constitutional right to resist the search.

The petitioners brief ("Pet. Br.") suggests that since the Fourth Amendment only bars "unreasonable searches and seizures," uncoerced consent searches should be deemed constitutional, i.e., "reasonable," even if the

consenting person had no idea that he could assert a constitutional right to resist the search (Pet. Br. 9-10). This Court has repeatedly emphasized, however, that those precisely defined and well-delineated exceptions to the warrant requirement are to be strictly construed to prevent the gradual evaporation of Fourth Amendment protections:

"It has been repeatedly decided that these Amendments [the Fourth and Fifth] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly overzealous executive officers." *Gouled v. United States*, *supra*, 255 U.S. at 304. *See also*, *Chimel v. United States*, 395 U.S. 752, 764-65 (1969); *Camara v. Municipal Court*, *supra*, 387 U.S. at 528-29.

Decisions as to what is "reasonable" under the Fourth Amendment are not made in a vacuum, for they must meet the basic constitutional tests applicable to all courts, whether state or federal. *Ker v. California*, *supra*, 374 U.S. at 33-34 (1963). Thus, California's rule that the consenting person's knowledge of the rights he is relinquishing is irrelevant, must conform to the "fundamental—i.e., constitutional—criteria established by this Court . . ." *Ker v. California*, *supra*, 374 U.S. at 34.

C. In Order To Establish That An Individual Has Waived His Fourth Amendment Rights By Consenting To A Warrantless Search, It Must Be Determined That The Waiver Was Knowingly And Intelligently Made.

The basic standard for determining whether an individual has waived a constitutional right was set forth in the leading case of *Johnson v. Zerbst*, 304 U.S. 458 (1938). In that case, this Court stated that such a waiver requires that there be "an intentional relinquishment or abandonment of a known right or privilege." 304 U.S. at 464. This standard is a necessary corollary of the grant of the constitutional right itself, for without the requirement that knowledge of the right be demonstrated before a waiver is deemed valid, the constitutional protection is reduced to being the special province of the sophisticated, the knowledgeable and the privileged. The requirement of knowledge serves the essential function of guaranteeing that all persons have the opportunity to make a meaningful choice before relinquishing their constitutional protections.

Since the decision in *Johnson v. Zerbst* was rendered in 1938, there have been numerous statements that a valid consent to a warrantless search constitutes a waiver of the Fourth Amendment protections. Thus, the consenting individual must understand what he is doing, the consent must be free from coercion, and the decision to consent must be knowingly and intelligently made. See, e.g., *Johnson v. United States*, 333 U.S. 10 (1948) ("[The consent to the search] was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional

right." 333 U.S. at 13); *United States v. Curiale*, 414 F.2d 744, 746-47 (2d Cir. 1969), *cert. denied*, 396 U.S. 959 (1969); *Pendleton v. Nelson*, 404 F.2d 1074, 1076 (9th Cir. 1968); *United States v. Miller*, 395 F.2d 116, 118 (7th Cir. 1968), *cert. denied*, 393 U.S. 846 (1968); *Rosenthall v. Henderson*, 389 F.2d 514, 515-16 (6th Cir. 1968); *Wren v. United States*, 352 F.2d 617, 618 (10th Cir. 1965), *cert. denied*, 384 U.S. 944 (1966); *Simmons v. Bomar*, 349 F.2d 365, 366 (6th Cir. 1965); *United States v. Smith*, 308 F.2d 657, 663 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963); *Judd v. United States*, 190 F.2d 649, 650-51 (D.C. Cir. 1951); *cf. Zap v. United States*, 328 U.S. 624 (1946).

The decisions of the Court of Appeals for the Ninth Circuit which were cited as authority for its holding in the pending case are clearly in line with the requirement that a waiver of Fourth Amendment rights can only be made if the individual knows of the rights he is relinquishing. The first of these cases was *Cipres v. United States*, 343 F.2d 95 (9th Cir. 1965), *cert. denied*, 385 U.S. 826 (1966). In that case U.S. Customs agents at Los Angeles International Airport asked the suspect if they could search her luggage. The suspect allegedly consented, but said that her bags were locked and that the keys were in New York. The agents found the bags to be unlocked, opened them and discovered marijuana. The Court ruled that Cipres did not effectively waive her Fourth Amendment rights:

"But the issue the court was required to decide was much broader, and could not be resolved simply by weighing the credibility of Cipres against that of the officers. The issue was whether Cipres had waived her constitutional immunity from unreasonable search and seizure. Waiver, in this context,

means the 'intentional relinquishment of a known right or privilege.' (citing *Johnson v. Zerbst, supra.*) Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld.

* * * *

"The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did." 343 F.2d at 97-98.

The second major case on which the lower court relied was *Schoepflin v. United States*, 391 F.2d 390 (9th Cir. 1968). Here, the court set out a four category test which it held must be satisfied before a consent search will be deemed valid:

"[T]he trial court determination that there had been an effective waiver cannot stand unless there is implicit therein a finding of fact that, under the described circumstances, the words used by [the suspect] reflected (1) an understanding, (2) uncoerced, and (3) unequivocal election to grant the officers a license which (4) [the suspect] knew may be freely and effectively withheld." 391 F.2d at 398.

The court found that the fourth element had not been established, and remanded the case for an inquiry into that issue.

In contrast to the criteria set forth in the cases discussed above, the California rule regarding consent searches disregards the individual's knowledge of his rights, and focuses solely on whether his consent was the

product of police coercion. The individual's knowledge is presumed from the fact that he consented to the search. *People v. Bustamonte*, 270 Cal. App. 2d 648, 653, 76 Cal. Rptr. 17 (1969).¹ The premise behind this narrow view of the consent search is the California courts' conception that the *only* purpose served by excluding illegally seized evidence is the deterrence of improper police conduct. *People v. Gorg*, 45 Cal. 2d 776, 783, 291 P.2d 469 (1955); *People v. Cahan*, 44 Cal.2d 434, 446-47, 282 P.2d 905 (1955) *Manwaring, California and the Fourth Amendment*, 16 *Stan. L. Rev.* 318, 334-36 (1964). This unduly narrow premise is contrary to the general rule that good faith on the part of the police will not validate an illegal search. e.g., *Cipres v. United States*, *supra*, 343 F.2d at 98.

The waiver criteria established by this Court and applied by the lower courts are not based solely upon the premise that illegal police conduct should be deterred by excluding evidence seized as a result of police coercion, *see, Elkins v. United States*, 364 U.S. 206, 217 (1960), but also on the duty of the courts to protect the rights of the citizen. *Cipres v. United States*, *supra*, 343 F.2d at 98; *see also, Harrison v. United States*, 392 U.S. 219, 224 n. 10 (1968); *Lee v. Florida*, 392 U.S. 378, 385-86 (1968); *Elkins v. United States*, 364 U.S. 206, 222-23

¹ In other contexts (consideration of California's claim and delivery law), the California Supreme Court has recognized that the waiver of Fourth Amendment rights by virtue of a consent to a warrantless search must constitute an intentional relinquishment or abandonment of a known right or privilege, and that the burden is on the government to show "by clear and positive evidence that the consent was freely, voluntarily and knowledgeably given." *Blair v. Pitchess*, 5 Cal.3d 258, 274-75, 96 Cal.Rptr. 42 (1971). However, the California courts apparently do not apply this rule in cases such as the one now before this Court. (*See Pet.Br.* at 8-14).

(1960). By focusing solely on the former premise, California has adopted a waiver test which is not consistent with federal constitutional guarantees.

D. The Petitioner's Arguments As To Why It Should Be Irrelevant Whether The Consenting Person Knew Of His Fourth Amendment Rights Do Not Affect The Result That California's Rule Is Unconstitutional.

The petitioner's brief raises a number of arguments in an attempt to justify California's refusal to comply with the constitutional criteria for a valid consent search. The first of these arguments is that California's rule makes consent a factual question which is to be presumed correct under 28 U.S.C. § 2254(1) (Pet. Br. 12-13). The issue before this Court, however, is the propriety of the California rule itself, rather than a finding of fact in a specific case. It is California's rule of law that makes the factual inquiry irrelevant; thus, it is clear that the applicant can question the state court proceedings because "the material facts were not adequately developed at the state court hearing..." 28 U.S.C. § 2254(d)(3). Only when the consenting person's knowledge of his right to resist the search is acknowledged to be an essential element of the consent's validity can the California courts claim that they have made an appropriate finding of fact. To reject the requirement of knowledge is to reject the possibility that such a finding of fact has been made. In addition, it has repeatedly been stated that a waiver affecting federal constitutional rights is a federal question, and that a state court finding does not bar an independent determination of that question in federal court in a habeas corpus proceeding. E.g., *Fay v. Noia*, 372 U.S. 391, 439 (1963); *Rice v. Olson*, 324 U.S. 786 (1945); *Montana v. Tomich*, 332 F.2d 987, 990 (9th Cir. 1964).

The petitioner's second argument is that requiring a finding that the consenting person had knowledge of his rights will make third party consent searches impossible (Pet. Br. 14-17). The initial response to this argument is that, to the extent that law enforcement officers seek to conduct searches without first obtaining a warrant, they must come within the narrow permissible exceptions to the warrant requirement.

"It is fundamental that the doctrine which recognizes the validity of a third party's consent to a search must be applied guardedly to prevent erosion of the protection of the Fourth Amendment, since it makes no requirement of the existence of probable cause for the search and does not constitute an exception based on necessity." *United States Ex Rel Cabey v. Mazurkiewicz*, 431 F.2d 839, 843 (3d Cir. 1970).

This Court, as well as the lower courts, have often considered the question of who may consent to a search on behalf of another. *E.g.*, *Stoner v. California*, 376 U.S. 483 (1964); *Chapman v. United States*, 365 U.S. 610 (1961); *Abel v. United States*, 362 U.S. 217 (1960); *United States v. Martinez*, 450 F.2d 864 (8th Cir. 1971); *Anderson v. United States*, 399 F.2d 753 (10th Cir. 1968); *United States v. Eldridge*, 302 F.2d 463 (4th Cir. 1962). The rules developed in this area are strictly enforced. *See, Stoner v. California, supra*, 376 U.S. at 488-89; Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 *Colum. L. Rev.* 130, 148-150 (1967); Note, *Effective Consent To Search And Seizure*, 113 *U. Pa. L. Rev.* 260, 272-77 (1964). The above cited authorities go to who can consent to a search; the question presented in this case is what constitutes a valid consent. Surely this Court will continue its close scrutiny

of the circumstances of third party consent cases, *see, Stoner v. California, supra; Chapman v. United States, supra*, while also continuing its close scrutiny of the content of the consent.²

The last of the petitioner's arguments is that "imposing a waiver requirement" (Pet. Br. 17) on California will lead to mandatory specific Fourth Amendment admonitions comparable to the Fifth Amendment admonitions required in *Miranda v. Arizona*, 384 U.S. 436 (1966).

²The petitioner's brief asserts that the Court of Appeal for the Ninth Circuit has refused to apply the waiver criteria with respect to federal convictions (Pet. B. 15, 24). In two of the cited cases, the issue of knowledge was not raised in the proceedings, and in the third case the question considered was whether specific Fourth Amendment admonitions are required in addition to Fifth Amendment admonitions to validate a consent search. In *United States v. Novick*, 450 F.2d 1111 (9th Cir. 1971), the police were called by the owner of a house whose wife had attempted suicide. When the police inquired as to whether there were weapons on the premises which the wife might use in another suicide attempt, the owner told them that his house guest had a rifle in his room. The rifle proved to be an unregistered machine gun, and the court held that the police attempt to help the homeowner seek out weapons in his house which could be used in a suicide attempt did not constitute an unlawful search. The second cited case, *United States v. Wilson*, 447 F.2d 1 (9th Cir. 1971) involved an individual who had been forced to take part in the crime and who was "determined" to help the police find evidence against the defendant. She took the police to the apartment where she had lived with the defendant and she tried to direct the police to where the evidence might be found. She later testified as a government witness. The last of the cited cases, *United States v. Noa*, 443 F.2d 144 (9th Cir. 1971), held that where specific warnings are given as required under *Miranda v. Arizona, supra*, further specific Fourth Amendment warnings are not necessary to validate a consent search. It should also be noted that both *Cipres* and *Schoepflin* were federal cases.

Since there was no determination made as to whether Alcala knew of his Fourth Amendment rights, however, it is difficult to see how the application of long standing constitutional criteria for determining a waiver's validity will inexorably lead to required Fourth Amendment admonitions in all cases. It is true that a number of courts and commentators have suggested that law enforcement officials should be required to inform a person of his Fourth Amendment rights before obtaining authorization to conduct a warrantless search. *United States v. Miller*, 395 F.2d 116, 118 (7th cir. 1968), *cert. denied*, 393 U.S. 846 (1968); *United States v. Nickrasch*, 367 F.2d 740 (7th Cir. 1966); *United States v. Moderacki*, 280 F. Supp. 633 (D. Del. 1968); *United States v. Blalock*, 255 F. Supp. 268 (E.D. Penn. 1966); Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 *Colum. L. Rev.* 130 (1967); Note, *Effective Consent To Search and Seizure*, 113 *U. Pa. L. Rev.* 260 (1964); Note, *Consent Search: Waiver of Fourth Amendment Rights*, 12 *St. Louis U. L. J.* (1968). It is also true that law enforcement agencies may decide to give Fourth Amendment admonitions as a judgment of good police practices.³ However, the question before the Court is California's unwillingness to apply long standing criteria for determining a waiver's validity, not whether specific Fourth Amendment admonitions are required in all cases. This Court may eventually decide that such warnings are required to ensure that Fourth Amendment rights are protected and

³ Some federal law enforcement agencies, such as the Bureau of Narcotics and Dangerous Drugs, obtain prior written consent to searches, and the written form recites that the consenting person is aware of his constitutional right not to have the search made. (Federal Bureau of Narcotics and Dangerous Drugs Form 5-N)

enforced, *cf.*, *Miranda v. Arizona, supra*, but the respondent's arguments, and the Ninth Circuit Court of Appeals' decision are based upon existing authorities regarding waivers of constitutional rights.

Other courts have applied these authorities in the absence of specific admonitions. In *Rosenthal v. Henderson, supra*, the court affirmed the District Court's finding that the government failed to sustain its burden of proving that the consent to search was intelligently given:

"The failure to advise the defendant of his right to withhold consent is only one factor to be considered. The failure to so advise might have more weight in one case than in another. To advise a person with experience or training in this field that he has the right to refuse consent would be a waste of words. To fail to so advise another, who by low mentality or inexperience is obviously ignorant of his rights, might in some cases be decisive. Other cases would doubtless fall between these two extremes." 389 F.2d at 516.

In *United States v. Curiale, supra*, the court upheld a consent search where the suspect told the law enforcement officer that "If I don't sign this [consent to search form], you are going to get a search warrant." 414 F.2d at 246. In considering the validity of Curiale's alleged consent, the court stated:

"Curiale's statement concerning the search warrant demonstrated an awareness of his right to resist the agent's search in the absence of a warrant. Although he understood his right, he nevertheless chose to relinquish it." 414 F.2d at 747.

The fact is that all trial courts must now inquire as to the consenting person's knowledge of his rights, and they are doing so. California cannot refuse to follow established constitutional criteria because of its fearful view of the future.

E. *Bumper v. North Carolina* Did Not Affect The Requirement That Courts Must Determine Whether Consent To A Warrantless Search Was Given With Knowledge That It Could Be Withheld.

The petitioner's brief asserts that this Court impliedly approved California's test in *Bumper v. North Carolina*, 391 U.S. 543 (1968). This assertion ignores both the facts in that case as well as the lower court decisions which this Court cited therein.

In *Bumper*, the police officers went to the petitioner's house, and one of them told the petitioner's grandmother that they had a warrant to search the premises. The petitioner was not home, and his grandmother let the police search the house. No warrant was produced at the trial.

The prosecutor, in attempting to justify the search, sought to rely on the grandmother's consent rather than on the warrant. This Court responded as follows:

"When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Bumper v. North Carolina*, *supra*, 391 U.S. at 550.

In *Bumper*, there was no question before the Court regarding knowledge of a constitutional right. The police,

by asserting that they had a warrant, coerced the suspect's grandmother into permitting the search, thereby making her awareness of her right to resist the search irrelevant; to quote the Court, the police announced "in effect that the occupant ha[d] no right to resist the search." Since the coercion was not based upon a lawfully issued warrant, the search itself was unlawful.

To the extent that there was "consent" to the search in *Bumper*, therefore, such consent merely constituted an intention to abide by the law and not resist a search purportedly authorized by a valid warrant; such consent was not an invitation to search. 391 U.S. at 549, n. 14. The case now before the Court involves the factual circumstance which was not considered in *Bumper*: a consent which, it is alleged, did constitute an invitation to search. Without a showing that such consent was given with knowledge that it could have been lawfully withheld, such consent could not have constituted a waiver of the constitutional right to resist the search.

The petitioner's assertion also ignores the lower court decisions cited favorably in *Bumper* which state that a consent search must constitute "an understanding, intentional and voluntary waiver by the defendant of his fundamental rights under the Fourth Amendment to the Constitution." *Bumper v. North Carolina*, *supra*, 391 U.S. at 549, n. 14 quoting from *United States v. Elliot*, 210 F. Supp. 357, 360 (D. Mass. 1962). Other cases cited in the Court's opinion include *Wren v. United States*, *supra*; *Simmons v. Bomar*, *supra*; *Judd v. United States*, *supra*; *Kovach v. United States*, 53 F.2d 639 (6th Cir. 1931). All of those cases acknowledge that a consent to a warrantless search must be "freely and intelligently given." Although it is true that a valid consent can be given which would not be a suspect's optimum decision, it is

equally true that to be "intelligently given," the suspect's consent must be based upon his knowledge of the right he is relinquishing. Therefore, rather than impliedly approving California's test, this Court, in *Bumper*, reaffirmed the base criteria of Fourth Amendment waivers, which must be applied in all cases. California has adopted a rule which does not conform to those basic criteria, and this Court should declare that rule to be unconstitutional.

II.

THIS COURT SHOULD NOT ABANDON ITS EARLIER DECISIONS THAT FEDERAL HABEAS CORPUS IS AVAILABLE TO STATE PRISONERS SEEKING TO RAISE FOURTH AMENDMENT CLAIMS.

A. Introduction.

The petitioner's brief, as well as the brief submitted by the amicus curiae on behalf of the petitioner ("A.C. Br."), argue that Fourth Amendment claims should not be available to state prisoners seeking to invoke federal habeas corpus to gain their release from detention. In the first instance, both briefs present arguments against the exclusionary rule itself; arguments which must either assume that other remedies are available to vindicate Fourth Amendment claims, or that the Fourth Amendment should be viewed as little more than a pronouncement of high-minded ideals which the police may violate with impunity. For as Justice Murphy stated in *Wolf v. Colorado*, *supra*:

"Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is

blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all.

* * * *

"The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence." 338 U.S. at 41, 44.

The exclusionary rule has given rise to considerable controversy, but the rule does deter some improper police conduct. See, J. Skolnick, *Justice Without Trial*, 224-25 (Wiley & Sons, Inc. 1966). In addition, the exclusionary rule demonstrates the fundamental importance which this Court has attached to the Fourth Amendment. No other remedy currently exists which can accomplish these two functions. Even the most scholarly empirical criticism of the exclusionary rule concludes by stating that the exclusionary rule, despite its disadvantages, should be retained until an effective alternative exists which can take its place:

"If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary

rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies." Oaks, *Studying the Exclusionary Rule In Search And Seizure*, 37 U. Chi. L. Rev. 665, 756 (1970)

This Court has suggested that remedies in addition to the exclusionary rule, such as actions for monetary damages, may be available to victims of illegal searches and seizures, see, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), but questions remain as to the immunity from such suits of law enforcement officers acting in their official capacity. 403 U.S. at 397-98. Moreover, it is conceded that no current alternative remedy exists at this time which would justify abandonment of the exclusionary rule. *Id.* at 420-21 (Burger, C.J., dissenting)

To withhold federal habeas corpus relief from state prisoners seeking to invoke the exclusionary rule is, therefore, to foreclose the effective assertion of Fourth Amendment claims through collateral attack. Both the historical development of federal habeas corpus jurisdiction for state prisoners as well as current policy considerations justify the continuing availability of such relief for valid Fourth Amendment claims.

B. Federal Habeas Corpus Developed as an Effective Remedial Device To Ensure State Compliance with Evolving Notions of Due Process.

Other than a few minor exceptions, federal habeas corpus was first made available to state prisoners in the Habeas Corpus Act of 1867 (Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385). The act provided that:

"[T]he several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States"

Historical data indicates that the Act was intended to extend federal habeas corpus power to the greatest extent possible. See, *Fay v. Noia*, *supra*, 372 U.S. at 415-17; *Townsend v. Sain*, 372 U.S. 293, 311-12 (1963).

Because the Supreme Court's appellate jurisdiction in habeas corpus cases was removed in 1868, and not restored until 1885, the first state prisoner case was not decided until 1886 when the Court ruled in *Ex Parte Royall*, 117 U.S. 241 (1886). In *Royall*, the Court stated that the federal courts' general grant of habeas corpus jurisdiction was "in language as broad as could well be employed." 117 U.S. at 247. The Court considered state-federal relationships in the context of the 1867 Act, and enunciated the "exhaustion of state remedies" doctrine. 117 U.S. at 252-53. Also, citing the then leading case of *Ex Parte Siebold*, 100 U.S. 371 (1879), the Court discussed the then prevailing theoretical underpinnings of habeas corpus relief, namely, that habeas corpus was available in cases where the court which tried the petitioner was without jurisdiction. Thus, if the convicting court lacked jurisdiction, the conviction itself was a nullity and habeas corpus would lie.

An extension of this "jurisdictional" approach was that habeas corpus would lie to review the constitutionality of the statute creating the offense. The basis of this theory was that a court which convicted the petitioner pursuant to an unconstitutional statute was without

jurisdiction: "the prosecution against [the defendant] has nothing upon which to rest, and the entire proceeding against [the defendant] is a nullity." *Ex Parte Royall*, *supra*, 117 U.S. at 248.

Many of the early decisions are difficult to reconcile today, but it appears that the basic approach was to consider whether a jurisdictional flaw could be detected in the trial proceedings. If such a flaw was detected, the resulting conviction was a nullity. On the other hand, if the case presented a question which the committing court was competent to consider, the committing court's decision was not collaterally attackable even if its decision was concededly erroneous. *See, in re Converse*, 137 U.S. 624 (1891). As time passed, it became increasingly difficult to explain habeas corpus decisions in terms of the approach of the early cases, yet references to "jurisdiction" continued for many decades. *See, Johnson v. Zerbst*, *supra*, 304 U.S. 465-68; Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 *Harv. L. Rev.* 441, 478-83 (1963) (hereinafter cited as "*Bator*"); Note, *Developments in the Law—Federal Habeas Corpus*, 83 *Harv. L. Rev.* 1038, 1048-50 (1970) (hereinafter cited as "*Developments—Federal Habeas Corpus*").

Major developments in federal habeas corpus for state prisoners began with two cases which involved claims of mob-dominated trials: *Frank v. Mangum*, 237 U.S. 309 (1915), and *Moore v. Dempsey*, 261 U.S. 86 (1923). In *Frank v. Mangum*, the Court stated that federal habeas corpus would lie if there was an absence of jurisdiction at the outset of the state proceedings or if jurisdiction was "lost" during the course of the proceedings as a result of a mob-dominated trial. 237 U.S. at 327, 335. The Court emphasized that the due process clause of the Fourteenth Amendment (as that clause was construed in 1915) only required that the state courts give a fair hearing to the

defendant's claims regarding his federal rights, even if the state court's decision was erroneous. 237 U.S. at 326. On this basis, the court held that if the state applied a "corrective process," i.e., an appeal at which the defendant's claims could be considered, the facts as found at that appeal would be taken as setting forth the truth of the matter, and federal habeas corpus would not lie. 267 U.S. 335-36.

Eight years later the Court decided *Moore v. Dempsey*, *supra*, which repudiated *Frank v. Mangum*'s conception that the mere fact that the petitioner had been given an opportunity to raise his federal constitutional claims in the State Supreme Court meant that he had been afforded due process of law. *See, Fay v. Noia, supra*, 372 U.S. at 420-21. In *Moore*, the Court ordered the District Court to investigate the facts of the petitioner's claim, and stated that:

"But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights." 261 U.S. at 91.

Although there are references in *Moore* to the adequacy of the state's "corrective process," the opinion clearly implies that the District Court must examine the facts for itself, for if those facts are true, the petitioner is entitled to relief. *Moore v. Dempsey*, therefore, was a substantial parallel development in federal habeas corpus jurisdiction as well as in the conception of the due process clause. The case has been viewed as a crucial

decision which not only dramatically changed the role of federal habeas corpus, but which also "gave birth to the modern aspect of due process." Reitz, *The Abortive State Proceeding*, 74 *Harv. L. Rev.* 1315, 1329 (1961).

Both cases constituted major developments in federal habeas corpus jurisdiction. In *Frank v. Mangum*, the Court made a new weapon available to the habeas corpus court: if the state courts failed to supply a corrective process to ensure fair consideration of the federal claim—whether or not jurisdictional—those questions could be investigated on federal habeas corpus to determine if the detention was lawful. *Bator, supra*, 76 *Harv. L. Rev.* at 486-87. *Frank v. Mangum*, thus, tentatively authorized the federal habeas corpus judge to look behind the bare record of the state proceedings. *Moore v. Dempsey* carried the law beyond *Frank v. Mangum* in that it specifically empowered the federal habeas corpus judge to consider the petitioner's federal claims even if they were passed upon by the state court. It is with *Moore v. Dempsey*, therefore, that the subtle shift took place from an inquiry into the adequacy of the state court's corrective process to an inquiry into the very issue of denial of due process. *Developments—Federal Habeas Corpus, supra*, 83 *Harv. L. Rev.* 1038, 1052-53. See also, *Peyton v. Rowe*, 391 U.S. 54, 59-60 (1968).

The "jurisdictional" approach began to wane with *Moore v. Dempsey*, but 15 years later it was still used in *Johnson v. Zerbst, supra*. In that case the Court held that failure to comply with the Sixth Amendment's guarantee of right to counsel resulted in the convicting court "losing" jurisdiction during the course of the trial. *Johnson v. Zerbst, supra*, 304 U.S. at 467-68. In *Waley v. Johnston*, 316 U.S. 101 (1942), the Court abandoned the jurisdictional approach entirely in a case dealing with an alleged coerced confession.

In 1953, this Court decided *Brown v. Allen*, 344 U.S. 443 (1953), and specifically affirmed that federal habeas corpus is available to state prisoners seeking to raise all federal constitutional claims. Acknowledging that the federal habeas corpus judge is to consider the state court findings, the Court stated that:

"[N]o binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." 344 U.S. at 508 (Frankfurter, J. speaking for five justices)

In a later decision, this Court reiterated that the rule set forth in *Brown v. Allen* is the reaffirmance of the basic purpose of the Habeas Corpus Act of 1867, namely:

"to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees." *Fay v. Noia, supra*, 372 U.S. at 416; *See also*, 372 U.S. at 415-26.

The development of federal habeas corpus jurisdiction over the last century has, in many respects, tracked the development of the due process clause of the Fourteenth Amendment. As the concept of due process rights has expanded, the scope of federal habeas corpus has expanded to provide the remedy to vindicate those rights.⁴ *See, Fay v. Noia, supra*, 372 U.S. at 401-02;

⁴The increasing use of federal habeas corpus has also, in part, been due to the abandonment of the system of prison censorship which bottled up many petitions. Schaefer, *Federalism and State Criminal Procedure*, 70 *Harv. L. Rev.* 1, 21 (1956) (hereinafter cited as "Schaefer").

Sokol, *Federal Habeas Corpus* 18-21 (Michie Co. 1969); *Developments—Federal Habeas Corpus, supra*, 83 *Harv. L. Rev.* at 1048-52. The argument that federal habeas corpus is now different in scope and function from what habeas corpus was in 1915, 1867 or 1700 (A.C. Br. 5-13) misses an essential point: The scope and function of the writ cannot be artificially crystallized and frozen out of the stream of time (Sokol, *Federal Habeas Corpus* 19-20 (Michie Co. 1969)). The writ has never been

“a static narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.” *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

As this Court has resisted attempts to turn back the developments under the Fourteenth Amendment, so too has it resisted attempts to curtail federal habeas corpus jurisdiction. Only three years ago this Court, in *Kaufman v. United States, supra*, rejected arguments with respect to federal prisoners which are identical to those arguments being presented in this case with respect to state prisoners.⁵ In *Kaufman*, this Court confirmed that both federal and state prisoners may avail themselves of federal habeas corpus to raise Fourth Amendment claims. Moreover, with particular regard to state prisoners, this Court stated that:

“The Government concedes in its brief that we have already rejected this approach [excluding search and seizure claims] with respect to the

⁵Even those commentators who argue for distinctions between state and federal prisoners concede that, while limitations on federal habeas corpus might be appropriate for federal prisoners, such limitations should not be applicable to state prisoners. See, Amsterdam, *Search, Seizure, And Section 2255: A Comment*, 112 *U. Pa. L. Rev.* 378, 379-82 (1964).

availability of the federal habeas corpus remedy to state prisoners. This rejection was premised in large part on a recognition that the availability of collateral remedies is necessary to insure the integrity of proceedings at and before trial where constitutional rights are at stake. Our decisions leave no doubt that the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial. (citing cases)" 394 U.S. at 225.

Circumstances have not changed during the past three years to justify overruling *Kaufman v. United States* and the historical development of federal habeas corpus jurisdiction which it represents. Rather, the same reasons which have always justified federal habeas corpus for state prisoners seeking to raise Fourth Amendment claims remain fully valid today.

C. Federal Habeas Corpus for State Prisoners Seeking To Raise Fourth Amendment Claims Is Necessary To Ensure Fair and Equal Treatment to All Citizens.

Federal habeas corpus jurisdiction is based upon the need for a separate proceeding, insulated from an inquiry into the defendant's guilt, to protect his constitutional rights. *Developments—Federal Habeas Corpus, supra*, 83 *Harv. L. Rev.* at 1057. Local interest as well as the trial court's primary function are concerned with the guilt-innocence determination. This is not to say that the trial court judges are unwilling to abide by constitutional requirements, but, as a distinguished State Supreme Court Justice has stated:

"[E]ven though [certain procedural] requirements come with the ultimate sanction of a constitutional command . . . it is not always easy to focus upon the procedural requirement and shut out considerations of guilt or innocence." *Schaefer, supra*, 70 *Harv. L. Rev.* at 13; *See also, Id.* at 5.

Counterpoised to this direct focus on the guilt-innocence determination is only the general notion of due process. History has shown that the protection and vindication of the accused's due process rights often requires a separate proceeding removed in time and place from the passions of the actual trial:

"It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office." *Fay v. Noia, supra*, 372 U.S. at 401-02; *See also, Schaefer, supra*, 70 *Harv. L. Rev.* at 5-6.

The availability of federal habeas corpus for state prisoners is also premised on the notion that there is an interest in having federal constitutional claims considered in a federal court. *Developments—Federal Habeas Corpus, supra*, 83 *Harv. L. Rev.* at 1060; *See also, Brown v. Allen, supra*, 344 U.S. at 498-500, 508-13 (Frankfurter, J., speaking for five justices). The state courts, even though following fair procedures, may nevertheless misconceive a federal constitutional right, and federal habeas corpus

has proven to be the most effective remedy available to vindicate those rights.

The arguments against federal habeas corpus jurisdiction are based upon the asserted social benefits of swift and certain punishment (A.C. Br. at 17), and the correlative need for finality in criminal proceedings. The benefits of swift, immediate punishment are conjectural, at best. Moreover, restricting an individual's opportunity to assert that his detention is the result of illegal conduct by the police is hardly calculated to foster respect for the law, especially in an era when too many citizens view governmental law enforcement activities as oppressive of rather than as protective of their rights and interests. Cf., Freund, *Remarks at Symposium on Federal Habeas Corpus*, 9 *Utah L. Rev.* 27, 30 (1964).

The major alleged justification for finality is that it is futile to seek "ultimate truths," and that it should be enough if the state courts fairly considered the defendant's federal constitutional claims, subject to the possibility of direct review by this Court. *Bator, supra*, 76 *Harv. L. Rev.* at 441-53. Since 1916, however, direct appeals by state prisoners have been available only in cases involving the constitutionality of a statute. Other constitutional claims, such as alleged denials of due process, are directly reviewable only on certiorari. 28 U.S.C. §1257. Many petitions for certiorari are prepared without the aid of counsel, and the large number of such petitions as well as the Court's general case load prevents access to certiorari from being "a normal appellate channel in any sense comparable to the writ of error." *Fay v. Noia, supra*, 372 U.S. at 436; See also Hart, *Forward: The Time Chart for the Justices, the Supreme Court*, 1958 Term, 73 *Harv. L. Rev.* 83 (1959). There-

fore, state prisoner claims regarding federal constitutional protections, including Fourth Amendment protections, can only be subjected to systematic federal court review through the use of federal habeas corpus.

The real question is whether the state's interests in finality outweighs the citizen's right to seek vindication of his federal constitutional rights. This is a judgment which this Court has carefully made on many occasions in the past in cases involving federal habeas corpus:

"The approach adopted by the [lower] court . . . and pressed upon us here exalts the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights. Such regard for the benefits of finality runs contrary to the most basic precepts of our system of post-conviction relief. In *Fay v. Noia*, *supra*, at 424, a case involving a state prisoner who claimed that his confession was coerced, we said that 'conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.' The same view was expressed in *Sanders v. United States* [373 U.S. 1, 8 (1963)], a case involving a federal prisoner: '[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.' This philosophy inheres in our recognition of state prisoners' post-conviction claims of illegal search and seizure." *Kaufman v. United States*, *supra*, 394 U.S. at 228.

The petitioner's brief and the brief of the amici curiae contend that the pending case is an example of the "unsoundness" of existing procedures (Pet. Br. at 30;

A.C. Br. at 18-19). On the contrary, this case provides ample evidence of the merits of existing procedures, and the dangers inherent in abandoning them.

Mr. Bustamonte objected to the introduction of the evidence resulting from the challenged search at his trial (App. 39-47), at the appeal to the California Court of Appeal (*People v. Bustamonte, supra*) and in his petition for a hearing to the California Supreme Court. At each level of the state proceedings, his objection was rejected on the basis of California's rule that lack of knowledge of Fourth Amendment rights has no bearing on the validity of a consent search; a rule which is contrary to the fundamental constitutional criteria enunciated by this Court (see Part I, *supra*).

After the California Supreme Court denied the petition for rehearing, Mr. Bustamonte filed a petition for a writ of habeas corpus in the U.S. District Court, a petition which he prepared without the aid of counsel. Only when the District Court's denial of the petition was appealed to the U.S. Court of Appeals for the Ninth Circuit did Mr. Bustamonte have an opportunity to present his federal constitutional claim, with the aid of counsel, to a court unfettered by California's erroneous rule. That it took

That it took three years and five months to have Mr. Bustamonte's rights vindicated was not due to delays on his part. On the contrary, Mr. Bustamonte's every desire was to be freed from his detention as soon as possible. That eleven California judges chose to abide by California's rule is understandable and to be expected in view of the California courts' narrow perception of the Fourth Amendment (See Part I, *supra*), and that a federal judge may have had a petition before him which did not fully set forth Mr. Bustamonte's claims should not reflect unfavorably on Mr. Bustamonte since he was then

impoverished and unable to obtain counsel to assist in the preparation of the petition.

Mr. Bustamonte has, therefore, promptly pursued those remedies which were available to him. He has exhausted all state remedies to no avail, and it has been left to the federal courts to vindicate his federal constitutional rights.

To withhold federal habeas corpus from Mr. Bustamonte and other state prisoners seeking to invoke the exclusionary rule would be to roll back the protections of the Fourth Amendment heretofore available to citizens tried in state courts. Without access to federal habeas corpus, it is unlikely that Mr. Bustamonte would ever have had an opportunity to challenge California's consent search rule in a federal court. To single out the Fourth Amendment's protections from among the provisions of the Bill of Rights applicable to the states, and to hold that such protections cannot be vindicated on federal habeas corpus, would end the careful, consistent review which the federal courts have been able to accord to Fourth Amendment questions. A review of the decisions of this Court resulting from prisoner federal habeas corpus applications raising Fourth Amendment questions stands as testimony to the need for such a remedy to guarantee full and fair protection of those rights. *See, Mancusi v. DeForte*, 392 U.S. 364 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Warden v. Hayden*, 387 U.S. 294 (1967).

Whether a state intentionally or inadvertently establishes an erroneous rule regarding the Fourth Amendment's protections, the result for the accused citizen whose rights are thereby violated is the same; he is imprisoned. The Constitution, the Congressional enact-

ments regarding federal habeas corpus and the decisions of this Court have not in the past, and should not now, permit that result. Federal habeas corpus for state prisoners is not a search for unattainable "ultimate truths;" rather it is a commitment to protect the constitutional rights of all citizens and to strive for equal treatment for all state prisoners seeking to raise federal constitutional claims. The benefits of the remedy are not a function of the relative quality or integrity of state judges versus federal judges, but a recognition that federal judges, with exclusive allegiance to this Court's pronouncements on fundamental constitutional questions, are institutionally free from the potentially erroneous and inconsistent decisions of the 50 state supreme courts. To this extent then, federal habeas corpus jurisdiction for state prisoners is an effective remedy to obtain "right" decisions; decisions which guarantee that the fundamental constitutional criteria set forth by this Court are fairly and equally applied to all citizens in all states.

CONCLUSION

For the foregoing reasons, the respondent respectfully requests this Court to affirm the decision of Court of Appeals for the Ninth Circuit.

Respectfully submitted,

STUART P. TOBISMAN

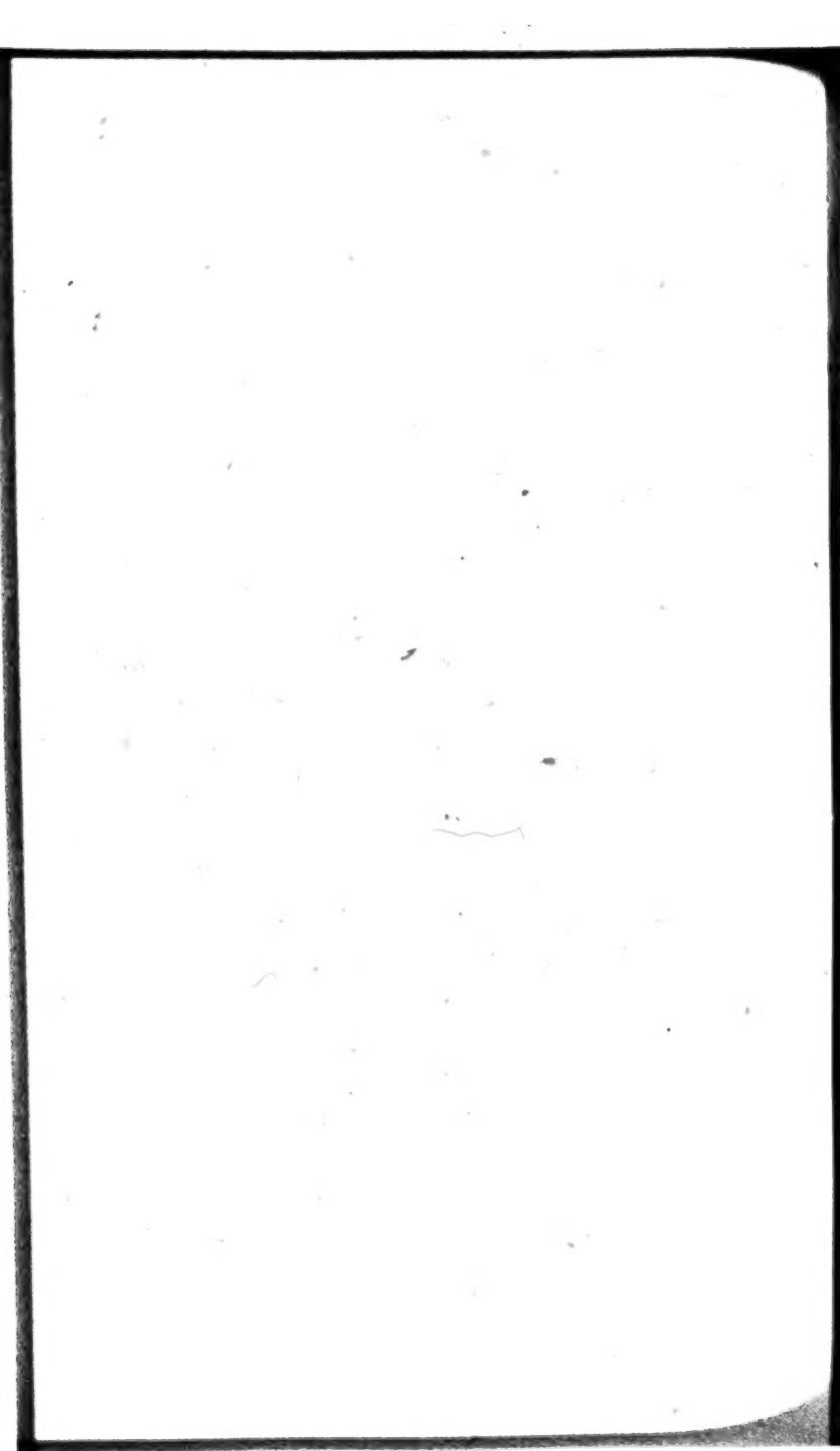
S. THOMAS POLLACK

Room 3600

611 West Sixth Street

Los Angeles, California 90017

Attorneys for Respondent



APPENDIX A**CONSTITUTIONAL PROVISIONS AND STATUTES
CITED IN RESPONDENT'S BRIEF****1. Fourth Amendment, U.S. Constitution.**

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Section 1, Fourteenth Amendment, U.S. Constitution.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Habeas Corpus Act of 1867 (Act of February 5, 1867, ch. 28 § 1, 14 Stat. 385.)

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all

cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States; and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writing and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known; and the said justice or judge to whom such application shall be made shall forthwith award a writ of habeas corpus, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States. Said writ shall be directed to the person in whose custody the party is detained, who shall make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person within three days thereafter, unless such person be detained beyond the distance of twenty miles; and if beyond the distance of twenty miles and not above one hundred miles, then within ten days; and if beyond the distance of one hundred miles, then within twenty days. And upon the return of the writ of habeas corpus a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning shall request a longer time. The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States, which allegations or denials shall be made on oath. The said return may be

amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, that thereby the material facts may be ascertained. The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty. And if any person or persons to whom such writ of habeas corpus may be directed shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment not exceeding one year, or by either, according to the nature and aggravation of the case. From the final decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court of the United States for the district in which said cause is heard, and from the judgment of said circuit court to the Supreme Court of the United States, on such terms and under such regulations and orders, as well for the custody and appearance of the person alleged to be restrained of his or her liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default of such, as the judge hearing said cause may prescribe; and pending such proceedings or appeal,

and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void."

4. 28 U.S.C. §1257.

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

"For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

5. 28 U.S.C. § 2254.

“(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

“(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

“(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

“(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is

admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

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OCT 3 1972

MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 732

MERLE R. SCHNECKLOTH, Superintendent,
California Conservation Center, *Petitioner*,

VS.

ROBERT CLYDE BUSTAMONTE, *Respondent*.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

CLOSING BRIEF FOR THE PETITIONER

EVELLE J. YOUNGER,

Attorney General of the State of California,

EDWARD A. HINZ, JR.,

Chief Assistant Attorney General—

Criminal Division,

DORIS H. MAIER,

Assistant Attorney General—Writs Section,

EDWARD P. O'BRIEN,

Assistant Attorney General,

ROBERT R. GRANUCCI,

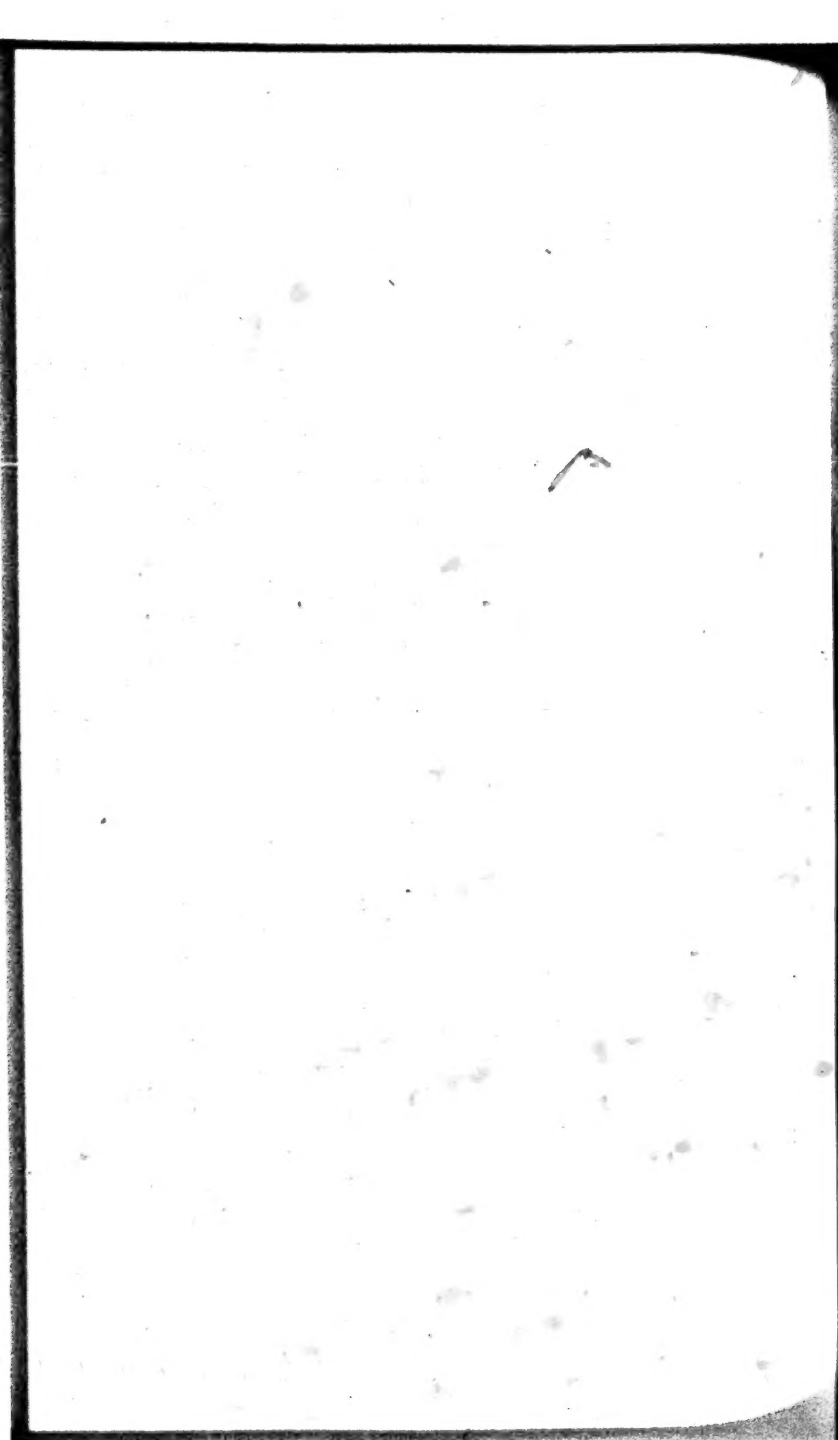
Deputy Attorney General,

6000 State Building,

San Francisco, California 94102,

Telephone: (415) 557-1959,

Attorneys for Petitioner.



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In the Supreme Court

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No. 732

MERLE R. SCHNECKLOTH, Superintendent,
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VS.

ROBERT CLYDE BUSTAMONTE, *Respondent*.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

CLOSING BRIEF FOR THE PETITIONER

INTRODUCTORY STATEMENT

Respondent Bustamonte appears to concede that if the California rule for judging consent searches is constitutionally acceptable then the consent search which turned up the three checks admitted into evidence against him was valid. Also, by agreeing with our statement of the facts, Bustamonte has focused the argument squarely upon the legal issues presently before the Court.

ARGUMENT

I

CALIFORNIA'S RULE FOR JUDGING CONSENT SEARCHES IS CONSTITUTIONALLY ACCEPTABLE

The heart of Bustamonte's first argument—as well as the core error of the Ninth Circuit—is his identification of consent searches with the waiver of rights conferred by the Fifth and Sixth Amendments. See *Boykin v. Alabama*, 395 U.S. 238 (1969); *McCarthy v. United States*, 394 U.S. 459 (1969); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Carnley v. Cockran*, 369 U.S. 506 (1962); *Johnson v. Zerbst*, 304 U.S. 458 (1938). This argument fails because the nature of the right conferred by the Fourth Amendment is fundamentally different from the rights conferred by the Fifth and Sixth Amendments. “The Fourth Amendment is not absolute in its terms.” *United States v. United States District Court*, 40 U.S.L.W. 4761 (June 19, 1972). And, “it must always be remembered that what the Constitution forbids is not all searches and seizures, but *unreasonable* searches and seizures.” *Elkins v. United States*, 364 U.S. 206, 222 (1960). (Emphasis added.) On the other hand, the Fifth Amendment does not guarantee security from unreasonable compulsory self-incrimination, but from all such incrimination. Neither does the Sixth Amendment say that the accused in a criminal case shall have the assistance of counsel or a jury trial when it is reasonable under the circumstances.

That the Fourth Amendment is couched in terms of reasonableness militates against a subjective waiver

standard and in favor of an objective standard for assessing the voluntariness of consent searches. The proper rule for assessing consent searches was recently set forth by the California Court of Appeal in *People v. Tremayne*, 20 Cal.App.3d 1006, 98 Cal.Rptr. 193 (1971). In that case the defendant, challenging a consent search argued that consent to search is to be judged by the standard applicable to the waiver of the right to remain silent, i.e., a showing that he had been warned of the right and expressly waived it. The court rejected this argument as based upon the false premise that in consenting to a search, defendant was waiving a constitutional right. The court explained:

“The purpose of the Fourth Amendment is to secure the privacy of people against unreasonable invasion by the police.

....

“Consent to a search confers authority to search; establishes the reasonable nature of a search premised thereon; is not a waiver of a constitutional right; and is effective without warning the person giving the consent he might refuse to consent.

“The real issue at bench is whether defendant freely and voluntarily consented to a search of his residence, and not whether he waived his constitutional right to be protected against an unreasonable search. Consent obtained by fraud or coercion, including submission to an express or implied assertion of authority, is not free and voluntary, and has no legal effect. (*People v. Shelton*, 60 Cal.2d 740, 746 [36 Cal.Rptr. 433,

388 P.2d 665]; *People v. Roberts*, *supra*, 246 Cal. App.2d 715, 727). The California rule recognizes the fact a person consenting to a search was not warned he had the right to refuse to consent is a circumstance to be considered in determining whether his consent was free and voluntary. [Citation.]” *Id.* at 1015-16, 98 Cal.Rptr. at 198.

As noted in *Tremayne*, California recognizes that a defendant’s knowledge of his right to refuse to consent is a circumstance to be considered in determining whether his consent was free and voluntary, but it is not determinative of the issue. This aspect of California’s consent search rule was also pointed out in our opening brief. Brief for Petitioner, p. 9. California’s approach parallels that followed by this Court prior to *Miranda* in assessing the voluntariness of confessions, *i.e.*, “low intelligence, denial of the right to counsel, and failure to advise of the right to remain silent were not in themselves coercive. Rather they were relevant only in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect. [Citations]” *Procurier v. Atchley*, 400 U.S. 446, 453-54 (1971). Thus, it is startling that respondent has at five separate points in his brief wrongly characterized California’s rule as making the consenting party’s knowledge of his right to refuse a search irrelevant. Respondent’s Brief, pp. 4, 8, 11, 13, 33. Under California law, knowledge is relevant but it is not determinative. To make it so would cause the reasonableness of governmental action under the Fourth Amendment to turn entirely on the affected party’s state of mind.

Respondent attempts to avoid our argument that adoption of a waiver standard would make valid third party consent searches virtually impossible, even though this Court has repeatedly held that a third party can consent to the search of a suspect's property. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Frazier v. Cupp*, 394 U.S. 731 (1969); *Abel v. United States*, 362 U.S. 217 (1960); see also Brief for Petitioner, pp. 14-17. Respondent attempts to distinguish these authorities as bearing only upon the question of who can consent to a search rather than what is necessary to constitute valid consent. Brief for Respondent, p. 14. To the contrary, the very fact that one can consent to a search of someone else's property demonstrates that consent searches are fundamentally different from the waiver of personal rights. It is inconceivable that this Court would countenance the waiver by a third party of a suspect's *Miranda* rights or his right to counsel in a criminal prosecution, or permit a third party to enter a plea of guilty for a defendant (*Cf. Boykin v. Alabama*, 395 U.S. 238 [1969]).

The fundamental difference between the subjective waiver standard applied to Fifth and Sixth Amendment rights and the objective standard used to judge the validity of a consent search is sharply illustrated by two recent cases. In *United States v. Elrod*, 441 F.2d 353 (5th Cir. 1971), a consent search was held invalid when the defendant, on motion to suppress evidence, came forward with proof that his codefendant, who had consented to the search, had a history

of mental illness and had been found incompetent to stand trial. The court, applying the subjective waiver standard, stated:

"Presumably it is a lamentation that to the burdens which now almost make a constitutional seer out of a policeman on that beat will be added the esoteric functions of an amateur psychiatrist. No matter how genuine the belief of the officers is that the consentor is apparently of sound mind and deliberately acting, the search depending on his consent fails if it is judicially determined that he lacked mental capacity. It is not that the actions of the officers were imprudent or unfounded. It is that the key to validity—consent—is lacking for want of mental capacity, no matter how much concealed." 441 F.2d at 356.

This approach totally disregards the purpose of the exclusionary rule by excluding probative evidence obtained in good faith by law enforcement officers who reasonably believed that the consenting party had the capacity to give consent.

A far more practical approach, and one in conformity with the purposes of the exclusionary rule, was adopted by the California Court of Appeal in *People v. Gurley*, 23 Cal.App.3d 536, 100 Cal.Rptr. 407 (1972). In that case the court held that the defendant, who at the time in question was under the influence of an injection of heroin and in something of a state of shock owing to the death of his wife from an overdose of that drug, could still give a valid consent to search his automobile. The court reached this conclusion upon the following analysis:

"The reasons supporting the Fourth Amendment exclusionary rule are: (1) 'to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard' [citation]; and (2) 'the imperative of judicial integrity' [citation]. In the situation where the officers act reasonably on the evidence before them (here the ostensibly rational statements of the defendant, although he may subsequently be found to have been irrational), the exclusion of the evidence seized with his apparent consent will not prevent similar conduct in the future under similar conditions.⁵ [footnote omitted] No deterrence is involved if the officers have acted in good faith on the facts as they appeared, because presumably they will be entitled to, and will, so act again in the future.

"The imperative of judicial integrity cannot be decisive in these circumstances. It can merely categorize a result which must be founded on other criteria. If the search is valid because the officers acted reasonably the court need not be embarrassed in admitting the evidence. If, however, the reasons of policy dictate that the evidence should be excluded to protect the right of privacy . . . integrity would require exclusion.

"Despite the similarity of approach which has been noted above, it is generally recognized that the exclusionary rules under the Fourth and Fifth Amendments involve some different considerations.

"In *United States v. Harris* (1971) 403 U.S. 573, [29 L.Ed.2d 723, 730, 91 S.Ct. 2075] the court quoted from *United States v. Ventresca* (1965) 380 U.S. 102, 108 [13 L.Ed.2d 684, 689,

85 S.Ct. 741] as follows: ‘ “[T]he Fourth Amendment’s commands, like all constitutional requirements, are practical and not abstract.” ’ In *Hill v. California* (1971) 401 U.S. 797, [28 L.Ed. 2d 484, 490, 91 S.Ct. 1106], the court affirmed a decision of the Supreme Court of this state which upheld a search of the premises of the defendant which had taken place there in connection with the arrest of an occupant who mistakenly, but reasonably, was believed to be the accused. It stated, ‘ When judged in accordance with “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,” *Brinegar v. United States*, 338 U.S. 160, 175, 93 L.Ed. 1879, 1890, 69 S.Ct. 1302 (1949), the arrest and subsequent search was reasonable and valid under the Fourth Amendment.’ (401 U.S. at p. [28 L.Ed.2d at p. 490].)

“In *People v. Hill* (1968) 69 Cal.2d 550 [72 Cal.Rptr. 641, 446 P.2d 521], the Supreme Court of this state had recognized the rule in this state to be as follows: ‘ Although sometimes criticized, the rule that a search is not unreasonable if made with the consent of a third party whom the police reasonably and in good faith believe has authority to consent to their search has been regularly reaffirmed.’ [Citations.] In *Hill* the state court concluded, ‘ In summary, we hold that the reasonable but mistaken beliefs of the police did not render their conduct unreasonable in a constitutional sense. Mistaken identity does not negate probable cause to arrest, and a search based on a valid but mistaken arrest is not unreasonable as an unwarranted invasion of either

the arrestee's or the defendant's privacy.' (69 Cal.2d at p. 555.)

. . . .

"It may further be noted that in this state it is not necessary to admonish the suspect, or occupant of property, as was in fact done in this case, that he has a right to refuse to consent to the search. [Citations.] It has also been noted that in the absence of fraud, ruse or subterfuge employed by the officers, the fact that the accused may have been under a subjective misapprehension as to the officer's intent will not invalidate his consent. (See *People v. Superior Court* (1969) 271 Cal.App.2d 524, 529 [76 Cal. Rptr. 518]; and *People v. Hale* (1968) 262 Cal. App.2d 780, 787 [69 Cal.Rptr. 28].)

"The foregoing precedents indicate that an objective standard should be used in determining whether there has been a valid consent to search, even when that consent emanates from an accused who later establishes, upon facts not readily apparent to the officers, that he was not in full possession of his faculties at the time. This conclusion is supported by the fact that if the invalidity of the consent can only be established later, it is then generally too late to secure a search warrant or take such other steps as might have been taken to secure and seize the contraband, loot or evidence, had consent been refused." *Id.* at 553-555, 100 Cal.Rptr. at 418-420.

In conclusion, we adhere to our position that consent to search is to be judged by an objective standard and that standard when applied to this case shows that Alcala's consent to search the Ford was validly given.

II

QUESTIONS RELATING TO SEARCH AND SEIZURE HAVING
NOTHING TO DO WITH THE GUILT OR INNOCENCE OF THE
DEFENDANT SHOULD NOT BE COGNIZABLE ON COL-
LATERAL ATTACK

Respondent commences his argument on the second issue in this case with an apologia for the exclusionary rule in its present form. However, the intrinsic merits of the exclusionary rule itself are not before the Court in this case. Similarly, when respondent takes pains to survey the expansion of federal habeas corpus since 1867 and argues that such expansion is both historically justified and beneficial today, he raises broader issues than are necessary to the resolution of this case. The historical arguments about expansion of the writ to allow collateral attack on criminal judgment (*compare Fay v. Noia*, 372 U.S. 391, 415-428 [1963] with P. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 [1963]; *Fay v. Noia*, *supra*, 372 U.S. at 449-460, dissenting opinion of Harlan, J.) need not determine the issue here.¹ What we do urge is simply that the impact of the federally mandated exclusionary rule upon a state's criminal justice system ought to be tailored to the purposes sought to be served by that rule.

It may be assumed for purposes of argument that the application of the exclusionary rule at the trial and direct review stages of state criminal proceed-

¹We do note, however, that compelling arguments have been made against the historical assumptions that underlay the majority opinion in *Noia*. See, e.g. D. Oakes, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451 (1966).

ings has some effect on the conduct of law enforcement officers. Cf. D. Oakes, *Studying the Exclusionary Rule in Search and Seizures*, 37 U. Chi. L. Rev. 665 (1970). But it is totally unrealistic to assume that the deterrent affect of the exclusionary rule on the average police officer will be any greater if he realizes that in addition to the remedies available at trial and on appeal the defendant has an additional right to challenge the admissibility of the evidence in the federal courts years after the state conviction has become final. The availability of adequate process in the state trial and appellate courts for the assertion of the exclusionary rule, together with the possibility of direct review in this Court, is a sufficient deterrent to illegal searches. This Court ought not to impose additional burdens on the already overtaxed state criminal justice system where the possibility of additional benefits in the form of further deterrence is nonexistent. Cf. *Harris v. New York*, 401 U.S. 222, 285 (1971).

That the exclusionary rule does not go to the integrity of the fact-finding process is well documented in the opinions of this Court. *Williams v. United States*, 401 U.S. 646, 653 (1971); *Desist v. United States*, 394 U.S. 244 (1969); *Linkletter v. Walker*, 381 U.S. 618 (1965). Thus, rejection of collateral attack on search and seizure claims involves no risk that an innocent man will remain imprisoned. In this connection it is worth noting that this Court has already insulated from federal habeas corpus review claims going to search and seizure and police interrogation methods in cases where the defendant has en-

tered a voluntary plea of guilty. *McMann v. Richardson*, 397 U.S. 742 (1970). This Court has observed that between 90 and 95 percent of all criminal convictions and between 70 percent and 85 percent of all felony convictions are by guilty plea (*Brady v. United States*, 397 U.S. 742, 752 n. (1970)). Can it be said that allowing collateral attack on search and seizure grounds in the remaining small percentage of cases that go to trial will have any real effect on the day to day performance of police work?

Further, despite the contrary hope expressed in *Fay v. Noia*, *supra*, 372 U.S. at 437, it is doubtful that the availability of collateral attack in the federal district courts on search and seizure grounds has had any appreciable effect in reducing the number of certiorari petitions in this Court's docket. It is unrealistic to assume that litigious prisoners will pass up any opportunity for the relitigation of their constitutional claims. In fact the availability of federal habeas corpus has given these prisoners an additional opportunity to seek certiorari from this Court, first after direct review in the state courts and again after an adverse decision from the federal appellate courts.

Respondent contends, however, that federal habeas corpus review on Fourth Amendment claims is necessary to insure fair and equal treatment to all citizens. Brief for Respondent, p. 29. This argument necessarily assumes that state courts, particularly state appellate courts, cannot be trusted to adhere to constitutional requirements unless the federal district

courts stand by to review their decisions. We propose three separate answers. First, in *Ker v. California*, 374 U.S. 23 (1963), this Court declared that once the fundamental criterion of reasonableness is met, the states are free to develop workable rules governing arrests, searches and seizures to meet the practical demands of effective investigation and law enforcement under the varying conditions and circumstances that exist in the different states. 374 U.S. at 34. Second, Congress, by enacting section 2254(d), clothed with a presumption of correctness findings of the state courts on constitutional questions once procedural due process requirements are satisfied, thus evidencing a measure of confidence in the state courts to adjudicate constitutional questions. Third, lack of confidence in the state courts has led to the situation where

“Conviction in the state courts now has become merely the starting point of interminable litigation. State appeals are followed by successive petitions for federal habeas corpus and successive federal appeals. What is involved is a repetitious, indefinite, costly process of judicial screening, rescreening, sifting, resifting, examining and re-examining of state criminal judgments for possible constitutional error. The protection of constitutional rights is the cornerstone of our system of criminal justice, but are the state judicial systems so weak, so inadequate as to require discarding all the traditional principles of *res judicata* and estoppel? No other nation in the world has so little confidence in its judicial systems as to tolerate these collateral attacks on criminal court judgments.” G. Doub, *The Case Against*

Modern Federal Habeas Corpus, 57 A.B.A.J. 323, 326 (1971).

Actually, respondent has verified our claim that collateral attack on Fourth Amendment grounds can be justified only if the interest of the states in maintaining the finality of criminal judgments is totally disregarded. He asks this Court to discount that interest. But finality in the criminal law is an end which must always be kept in plain view. *Mackey v. United States*, 401 U.S. 667, 690 (1971), concurring opinion of Harlan, J.; see also H. Friendly, *Is Innocence Irrelevant, Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146-151 (1970).

Rejection of collateral attack on state convictions on Fourth Amendment grounds carries with it absolutely no risk that an innocent person will be held in custody in violation of his constitutional rights. Neither will it substantially affect police practices. What it will do is free the limited resources of the federal courts and the states for more productive work.²

²"Indeed, the most serious single evil with today's proliferation of collateral attack is its drain upon the resources of the community—judges, prosecutors, and attorneys appointed to aid the accused, and even of that oft overlooked necessity, courtrooms. Today of all times we should be conscious of the falsity of the bland assumption that these are in endless supply.²⁶ Everyone concerned with the criminal process, whether his interest is with the prosecution, with the defense, or with neither, agrees that our greatest single problem is the long delay in bringing accused persons to trial.²⁷ The time of judges, prosecutors, and lawyers now devoted to collateral attacks, most of them frivolous, would be much better spent in trying cases. To say we must provide fully for both has a virtuous sound but ignores the finite amount of funds available in the face of competing demands." [Footnotes omitted.] Friendly, *op. cit. supra*, pp. 148-149.

CONCLUSION

We respectfully submit that the judgment of the United States Court of Appeals should be reversed.

Dated, October 2, 1972.

EVELLE J. YOUNGER,

Attorney General of the State of California,

EDWARD A. HINZ, JR.,

Chief Assistant Attorney General—

Criminal Division,

DORIS H. MAIER,

Assistant Attorney General—Writs Section,

EDWARD P. O'BRIEN,

Assistant Attorney General,

ROBERT R. GRANUCCI,

Deputy Attorney General,

Attorneys for Petitioner.

IN THE
Supreme Court of the United States

OCT 3 1972

OCTOBER TERM, 1972

No. 71-651

STATE OF CALIFORNIA,

Petitioner,

—v.—

JUDITH H. KRIVDA and RODGER T. MINOR,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. 71-732

MERLE R. SCHNECKLOTH, Superintendent,
California Conservation Center,

Petitioner,

—v.—

ROBERT CLYDE BUSTAMONTE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
AND THE AMERICAN CIVIL LIBERTIES UNION OF
SOUTHERN CALIFORNIA, AMICI CURIAE**

RICHARD E. POSELL

1888 Century Park East
Suite 1010
Los Angeles, California 90067

A. L. WIRIN

FRED OKRAND

LAWRENCE R. SPERBER

American Civil Liberties Union
of Southern California
257 South Spring Street
Los Angeles, California 90012

Counsel

HEATHCOTE W. WALES

Georgetown University
Law Center
Washington, D.C. 20001

MELVIN L. WULF

SANFORD-J. ROSEN

JOEL M. GORA

American Civil Liberties Union
Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Amici Curiae



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-651

STATE OF CALIFORNIA,

Petitioner,

—v.—

JUDITH H. KRIVDA and RODGER T. MINOR,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

No. 71-732

MERLE R. SCHNECKLOTH, Superintendent,
California Conservation Center,

Petitioner,

—v.—

ROBERT CLYDE BUSTAMONTE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
AND THE AMERICAN CIVIL LIBERTIES UNION
OF SOUTHERN CALIFORNIA, AMICI CURIAE**

Interest of *Amicus Curiae**

The American Civil Liberties Union is a nation-wide, non-partisan organization with over 170,000 members in the United States. Its affiliates in California are the ACLU of Southern California, and the ACLU of Northern California. The ACLU is engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-two year existence, the ACLU has been concerned with both the integrity of the judicial process and the protection of Fourth Amendment rights from the unlawful actions of state and federal officials.

These cases present significant issues concerning the substance and sanctions of the Fourth Amendment. At stake are the integrity of the criminal justice process and the effective protection of Fourth Amendment rights, not only for those charged with and prosecuted for crimes, but for us all.

On the issues presented as to the scope of the substantive protections of the Fourth Amendment, we would like to associate with the ably presented positions of Respondents. Our sole purpose is to suggest several additional considerations concerning the exclusionary rule to guide the Court should it reach those issues.

Summary of Argument

The exclusionary rule gives substance to the individual's rights to be free from unreasonable search and seizures in two ways: (1) it serves to uphold the integrity of the courts and the criminal justice system; and (2) it deters the law

* Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

enforcement apparatus from gathering evidence of criminal conditions by unconstitutional means.

I.

The exclusionary rule derives from the Constitution and not solely from the Court's supervisory power. *Mapp v. Ohio*, 367 U.S. 643 (1961). Thus the rule compels the Court to shun knowing collaborations in the deprivation of constitutional rights, regardless of how inadvertent the initial violation of rights may have been. Citizens are assured that whatever improprieties occur on behalf of the executive branch of government, the courts will not participate in furthering the injury.

II.

Deterrence is effected by rendering conviction on the basis of illegally seized evidence impossible. Recent evidence shows that as police departments become more professional, conviction rates become a more significant index of success in police work. The exclusionary rule has encouraged and continues to encourage the trend toward professionalization of the police. Without the absolute exclusion of illegally seized evidence, police will be encouraged by the dictates of efficiency to ignore constitutional values.

III.

The "substantial violation" rule proposed by Petitioners in *Krivda* as a substitute for the exclusionary rule would impugn the integrity of the courts and would substantially eviscerate the deterrent effect of the current rule. Measured against Petitioner's own criticisms of the exclusionary rule, the "substantial violation" rule would exacerbate the difficulties police and courts have and would have under the

exclusionary rule. Furthermore, the "substantial violation" rule would turn court attention from the protection of the individual's rights to a determination of the fault of the police, thus putting the police on trial rather than the defendant.

IV.

Finally, Petitioner's suggestion that exclusionary rule claims be made unavailable to state prisoners seeking federal habeas corpus relief would wreak havoc with this Court's precedential development of the Great Writ. See, e.g. *Fay v. Noia*, 372 U.S. 391 (1963). Nor are the causes of judicial integrity or deterrence served by this illogical distinction between collateral attack and direct appeal. The principal impact of such a distinction would be to deprive most state criminal defendants of a federal forum for adjudication of their federal rights, thereby undermining what even severe critics agree is a primary benefit of the exclusionary rule.

ARGUMENT

Preliminary Statement

To argue that the exclusionary rule fails to protect adequately the constitutional rights of citizens is to state the obvious. Yet to argue that the rule fails to protect the rights of anyone would be false. Rather, the argument against the exclusionary rule seems to turn on its presumed failure directly to protect anyone other than those accused of crime. We do not agree with this analysis. But even if the assumption is made *arguendo*, the degree of constitutional protection that obviously is afforded by the exclusionary rule justifies its continued existence.

Despite the existence of criminal activity in every socioeconomic stratum of our society, the primary clientele of the criminal justice system are drawn from the lowest stratum. *President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967), at 43-45. They are the very young, the poor, the powerless. By reason of their ignorance, their lack of professional assistance, or plea bargains struck on their behalf, they are the persons most easily dissuaded from pursuing affirmative remedies to redress violations of their constitutional rights. Their plight is least visible to those who mold public opinion. Indeed, public opinion will most likely demand that they be dealt with harshly and efficiently. Hence without the exclusionary rule they are without any defense against the unconstitutional intrusions of state and federal officers. But the success of a democracy is measured by the quality of life of its most oppressed citizens. What this Court does to protect the rights of the most wretched criminal will symbolize to the country and the world the extent of individual liberty in the United States. See, e.g., T. Arnold, *The Criminal Trial as a Symbol of Public Morality*, in *CRIMINAL JUSTICE IN OUR TIME* 137 (Howard ed. 1965); S. Rosen, *Contemporary Winds and Currents in Criminal Law, With Special Reference to Constitutional Criminal Procedure*, 27 *MD. L. REV.* 103, 108-114 (1967). Thus we urge this Court to stand firmly in support of the exclusionary rule of the Fourth Amendment.



I.

The exclusionary rule is constitutionally compelled and is essential to the integrity of the courts and the criminal justice system.

Petitioners direct their attack upon the exclusionary rule to the issue of deterrence, deliberately failing to acknowledge that they are asking this Court to participate in and sanction prosecutorial deprivations of constitutional liberties. It has long been settled that courts cannot wash their hands of the manner in which evidence is brought before them. E.g., *McNabb v. United States*, 318 U.S. 332 (1943). To find on the one hand that the state has violated a defendant's Fourth Amendment rights in obtaining evidence against him, and then to find on the other hand that his conviction based upon such evidence has been obtained consistent with the requirements of due process of law is unacceptable logic. This Court cannot pretend to uphold the Constitution when it lends its offices to such use of illegally seized evidence. In the strictest sense, this Court did not fashion a remedy for illegal searches and seizures when it enunciated the constitutional requirement of the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914) and again in *Mapp v. Ohio*, 367 U.S. 643 (1961). It merely stated its refusal consciously to facilitate and reward the unconstitutional activities of the executive branch. What was true for Mr. Justice Brandeis in 1928 is even more appropriate today when the integrity of governmental institutions is being questioned from all quarters:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupu-

lously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (dissenting opinion).

Some critics have argued that the exclusionary rule was a product of the Court's supervisory power and is not constitutionally compelled, despite the clear language of *Weeks* in which Mr. Justice Day found the trial court's refusal to suppress illegally obtained evidence "a denial of the constitutional rights of the accused." 232 U.S. at 398. The Court appeared to waver on this issue in *Wolf v. Colorado*, 338 U.S. 25 (1949), but in *Mapp*, Mr. Justice Clark repeatedly emphasized the constitutional basis of the exclusionary rule:

There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed. 367 U.S. at 649.

Petitioners argue that the integrity—or at least the popularity—of the courts is under attack because some criminals

go free as a result of the exclusionary rule. When the exclusionary rule is virtually the only mechanism through which violations of individual rights are vindicated, popular feeling for the courts and for the rights they protect may well be affected. But any current misunderstanding of the protection against unlawful searches and seizures or the exclusionary rule is not caused by our constitutional tradition of judicial responsibility. Rather, the fault lies with the executive and legislative branches of government which have neglected the establishment of other effective civil and criminal remedies against unconstitutional police conduct. If the exclusionary rule standing alone distorts the public's picture of what the Fourth Amendment is all about, it must be supplemented—not watered down or abandoned—to teach the public the value of individual liberty.

II.

The exclusionary rule is a necessary condition for effective deterrence of illegal police conduct.

Our thesis is simple: this Court has been correct in holding since 1914 that the exclusionary rule is a necessary first condition in any judicial program to deter illegal police conduct.

It is important to recognize at the outset that the exclusionary rule is directed not only at illegal police conduct, but at the violation of constitutional liberties by the entire criminal justice apparatus. Thus the exclusionary rule is not truly a sanction directed at the individual police officer, either by its terms or by its effect—hence the absence of any terms placing “blame” on the police officer. The rule exists to enforce the Fourth Amendment throughout the criminal justice system, from the officer on the beat, to the magistrate, to the prosecutor, to the trial judge. Indeed, one of the difficulties in tracing the deterrent effect of the rule is that each of the participants in the criminal justice process is reacting to a different set of goals and group norms. See, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, 149-60 (1969); H. Packer, *Two Models of the Criminal Process*, in THE LIMITS OF THE CRIMINAL SANCTION, pp. 149-73 (1968). The exclusionary rule focuses on one goal more or less common to all aspects of the system—the conviction of offenders—but fails to address other goals held by different agencies within the system.

Police have as their primary goal the detection and control of criminal conduct. One of a number of methods of

achieving this goal is to place as many criminals as possible behind bars, a technique best accomplished by making a "good pinch," i.e. an arrest leading to conviction of the offender. To be sure, other methods exist by which the police may achieve their goal in whole or in part, including harassment of petty offenders, confiscation of contraband, and use of the threat of arrest to obtain underworld informers, to name a few. Deterrence of these and other techniques of crime control, which may involve unconstitutional police practices, generally requires sanctions other than the exclusionary rule.

It is important to acknowledge that the generalized goals of crime control often conflict with values of the Fourth Amendment. H. Packer, *Two Models of the Criminal Process*, *supra*; J. Skolnick, *JUSTICE WITHOUT TRIAL*, 220 (1966). Individual police officers may, in their roles as citizens, sense some compunctions about breaking into a private residence without a warrant, but the demands of their jobs conflict with such scruples. It is only when such values are translated into the values associated with good police work that they become effective influences upon police conduct:

My observations suggest . . . that norms located within police organization are more powerful than court decisions in shaping police behavior, and that actually the process of interaction between the two accounts ultimately for how police behave. This interpretation does not deny that legal rules have an effect, but it suggests that the language of courts is given meaning through a process mediated by the organizational structure and perspectives of the police. J. Skolnick, *JUSTICE WITHOUT TRIAL*, *supra*, 219-20.

We draw two conclusions about the utility of the exclusionary rule from Skolnick's observation: (1) without sanctions such as the exclusionary rule, court pronouncements on the meaning of the Fourth Amendment will fall on deaf ears as they did prior to *Mapp*; and (2) any failings of the exclusionary rule to date can be ascribed to shortcomings in the translation of judicially articulated values to police work values. The latter point receives substantiation from LaFare & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1012 (1965):

As for the exclusionary rule, its limited impact [on police officials] is attributable in large measure to inadequate communication between the police and the courts.

One solution is for prosecution and police officials to educate the police officer on the beat as to his constitutional obligations. Much has been accomplished in the last five years. Since the President's Commission on Law Enforcement and Administration of Justice proposed in 1967 that all police departments employ full or part-time legal advisers (*THE CHALLENGE OF CRIME IN A FREE SOCIETY*, 114), over 100 metropolitan police departments have established such positions. One function for these advisers, only recently coming into vogue, has been to make rules for police conduct in typical, on-the-street situations. Police training manuals have likewise undergone substantial revisions with new emphasis being placed on constitutional and statutory obligations in police work. Progressive departments are encouraging their officers to take on new training and education programs which, among other things, sensitize police

officers to the mandates of the Constitution. And in Washington, D. C., the police are experimenting with an even more far-reaching mechanism for the legal education of their officers, described by Chief Jerry Wilson and Department General Counsel Geoffrey Alprin in an article soon to be published in **LAW AND CONTEMPORARY PROBLEMS**:

In the District, we have recently begun an experiment for surfacing, for the benefit of higher officials in the Department, those non-prosecuted cases which before have never reached the attention of the courts and seldom have been reviewed within the Department. In cooperation with the local United States Attorney's Office, the Department has created a specialized unit, staffed with police officials, with responsibility for reviewing every case which is dropped by the prosecutor, for whatever reason. Errors in police procedures, whether of exclusionary rule character or not, are brought to the attention of the offending officer and his commanding official, who is required to insure that the officer is counselled and instructed in proper processes. The Case Review Section maintains records by officer and unit so that recurrent patterns of misconduct or procedural error can be observed and corrected. In those areas where direct Department orders apply, as, for example, the identification of automobile search orders, egregious or repetitive errors may be dealt with through the Department's disciplinary processes. To offset particularly significant patterns adversely affecting prosecution of cases, members of the Section regularly instruct recruit and in-service training classes at the Department's Academy. Statistics are maintained by the Section and are available to the public.

We join with the *amicus* brief of Americans for Effective Law Enforcement (AELE) in noting the rising degree of professionalism in police departments around the country. Unlike that organization, however, we recognize the role the exclusionary rule has played both in initiating the trend and in maintaining it. What the description of Wilson and Alprin tells us is that the better-run police departments in this country place a very high value indeed on conviction rates. The Case Review Section was born out of a desire to reduce the "no paper" or no court action rate of the prosecutor's office, estimated by the authors at better than twenty per cent (see also, "1 in 5 Charges Dropped," The Washington Post, March 29, 1972, §C at p. 1, col. 8), a substantial portion of which results from exclusionary rule violations. We believe that the exclusionary rule is largely responsible for bringing police departments out of the dark ages of the third degree, that police departments are becoming increasingly sensitive to constitutional limitations as they affect conviction rates (and not out of any new-found altruism), and that future refinement of police procedures is largely dependent on retention of the exclusionary rule and the addition of affirmative sanctions and remedies for gross forms of police negligence and willful misconduct.

For police departments less professional than that of the District of Columbia, the exclusionary rule may play a less significant deterrent role because of the reduced emphasis on conviction rates as an index of police success. But for this Court to modify or remove the constitutional requirement of the exclusionary rule is to tell more progressive departments that they may increase efficiency without refining police procedures to protect the rights of citizens.

Such an alteration of the rule would retard progress where it is now under way, while having little or no effect on the operations of less professional police departments.

To suggest, as does the AELE (*amicus* brief at 18-19), that police are just as likely to behave constitutionally without the exclusionary rule because of internalized notions of professionalism is to deny what every police officer and every citizen knows: police observance of Fourth Amendment safeguards is inefficient in that it requires police to make greater allocation of energy, than would be true in their absence, to achieve proper law enforcement goals. Professionalism in police work, as in most occupations, places a high premium on efficiency, and indeed most criticisms of the exclusionary rule center on the inefficiency it produces in law enforcement efforts. Due process and efficiency in law enforcement are necessarily conflicting goals, and the AELE knows it.

To suggest, as does the Attorney General of Illinois (*amicus* brief at 7-8), that police misconduct can be effectively controlled by community opinion is utterly baseless and is contrary to this Court's long experience in reviewing police procedures. The primary clientele of the criminal justice system comes from the lowest socio-economic classes, many of whom are members of racial minorities. THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra*, 44-45. This group (and police practices toward them) is the least visible of any in our society to those who lead community opinion. The average criminal defendant is as powerless as almost anyone in America; he is the one most in need of precise, prophylactic constitutional rules.

Finally, we are unable to report any empirical studies of satisfactory methodology which indicate either the exist-

ence or absence of deterrence of unconstitutional police practices as a result of the exclusionary rule. The most ambitious of these studies, though appended by many harsh words for the exclusionary rule, proves nothing:

... The foregoing findings represent the largest fund of information yet assembled on the effect of the exclusionary rule, but they obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 709 (1970).

Nor do the figures of the AELE on appellate cases (*amicus* brief at 12-17) prove anything about current levels of police compliance with court rulings. Many cases of police misconduct never reach the charging stage. Of those that do, many are dropped immediately by the prosecutor, some by reason of patently illegal police conduct. Of those prosecuted, roughly 90% result in guilty pleas; and of these cases, many have been plea bargained for a reduced charge because there existed in the case a viable exclusion of evidence issue. Of the remaining cases, most are resolved at trial without appeal. Thus AELE has succeeded only in demonstrating that in the scale of virtues of criminal defense attorneys, tenacity can lead to one's client's freedom.

Thus the evidence on deterrence is summarized simply. On the one hand, increasing professionalism in police departments across the country shows a higher value being placed on conviction rates, the police goal most directly influenced by the exclusionary rule. On the other hand, no satisfactory empirical study exists to prove whether the rule does or does not deter. We believe the inadequacies of

statistical studies are insufficient reason to abandon a rule which makes good common sense as well as at least symbolizes and possibly vindicates the unquestioned constitutional values of the Fourth Amendment.

III.

Petitioners' "substantial violation" test would reduce deterrence and create confusion for the courts.

Petitioners' proposal of a "substantial violation" test is certainly not very original. Their sketch of "the substance of the criteria" of § 8.02(2) of the American Law Institute, Model Code of Pre-Arrest Procedures, p. 23 (Tent. Draft No. 4, 1971) (Pet. Brief in *Krivda* at 51-52), is nothing more than a warmed-over version of the "shocks the conscience" test put to rest by this Court in *Mapp*.

At the outset it is necessary to expose petitioners' rather deceptive allusion to the ALI proposal. Petitioners' proposed rule may represent "the substance of the criteria" of the ALI proposal (Pet. Brief in *Krivda* at 52, n. 6), but the differences between the two are far more substantial than the similarities. The ALI version purports to effect no changes in the essential *Mapp* rule requiring automatic exclusion of evidence seized in violation of the Fourth Amendment. The ALI "substantial violation" rule is aimed only at those violations of the Model Code's provisions which are not of constitutional dimension. Petitioners' proposed rule, however, would apply to *constitutional* violations, thereby requiring the Court to overrule *Mapp*. This rule is more closely related to Senate Bill No. 2657, 92nd Congress, 1st Session, which likewise ignores the subtleties of the ALI position. Petitioners are in good company, however, as

Professor Charles Alan Wright, normally a more careful scholar, has committed the same oversight. Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEXAS L. REV. 736, 745 (1972).

Unlike the ALI proposal which purports to add to the exclusionary rule, Petitioners' proposal would gut it. Petitioners and their allies would ask the trial courts in suppression hearings to balance such criteria as the willfulness of the police misconduct and the extent to which the police conduct deviated from Fourth Amendment norms. The Attorney General of Illinois even suggests (*amicus* brief at 12) that the trial judge take into account the seriousness of the crime charged, a criterion which, as a matter of practicality, also lurks in the background of petitioners' statement of the proposed rule.

Amici find it curious that petitioners' proposed rule, when considered against the backdrop of the many criticisms of the current exclusionary rule, not only fails to resolve those criticisms, but actually exacerbates them. Consider the following:

1) Critics charge that under the exclusionary rule, the policeman rather than the criminal is on trial.

Response: The "substantial violation" rule focuses court attention on the degree of the policeman's fault in conducting the illegal search and seizure. The officer is required to defend his judgment and his good faith in executing the search and seizure. If the violation is truly substantial, the officer may take refuge in perjury or he may be well-advised to invoke the privilege against self-incrimination in the

suppression hearing. If the seriousness of the defendant's alleged crime is to be taken into account, either explicitly or implicitly, the suppression hearing will become a battle over whose offense was greater, that of the defendant or that of the police officer. It is unreasonable to assume that the defendant would ever win such a contest. The fault of the officer is relevant to civil and criminal litigation and department disciplinary proceedings against him, but is irrelevant to the issue of suppression.

2) Critics charge that the exclusionary rule does not deter because no police officer can understand or keep up with all the case law on the Fourth Amendment.

Response: Under the "substantial violation" rule, the officer must learn not only the substantive law of the Fourth Amendment, but he must be well acquainted with the predilections of local judges in finding what constitutes a "substantial violation" of the Fourth Amendment. If the substantive law of the Fourth Amendment is uncertain, consider the uncertainty inherent in a case-by-case evaluation by all the trial judges in the country of what "substantial violation" means. Courts will be asking themselves whether the police officer conducted a "reasonable or unreasonable" unreasonable search and seizure. It is difficult to imagine a rule which would cause greater confusion to the average police officer.

3) Critics charge that the exclusionary rule generates countless pre-trial suppression motions which delay trial of the offender, thereby diluting the efficacy of the criminal sanction.

Response: Criminal defendants will be just as willing to file suppression motions under the "substantial violation" rule. Pre-trial hearings on such motions are likely to become more complex than they are now under the relatively simple, automatic exclusionary rule. In addition, if interlocutory appeals of pre-trial suppression hearings are permitted, as some have proposed, the criminal process will become even more drawn out than it is today.

4) Critics charge that the exclusionary rule encourages police perjury.

Response: Under the "substantial violation" rule, police will have even greater reason to perjure themselves, since civil and criminal litigation and department disciplinary proceedings may ensue. In addition, the flexibility and subjectivity of the proposed rule makes perjury easier. Nor can we feel any better about honest and open violations of the law about which the courts can do nothing.

5) Critics charge that the exclusionary rule encourages police officers to engage in harassment and other law enforcement tactics which do not anticipate formal arrest and prosecution.

Response: Under the "substantial violation" rule, police officers will receive even greater encouragement to employ such tactics, knowing that a suppression hearing may implicate them for civil and criminal litigation and for department disciplinary proceedings.

6) Critics charge that since the exclusionary rule is only minimally effective, we should try something different.

Response: The "substantial violation" rule has been tried at the Supreme Court level and has been found unworkable because of its subjectivity. *Rochin v. California*, 342 U.S. 165 (1952); *Irvine v. California*, 347 U.S. 128 (1954). The chaos which would ensue were it to be attempted by trial judges around the country ruling in suppression hearings is almost inconceivable.

In short, we urge that adoption of the hastily contrived "substantial violation" rule would come close to eliminating whatever deterrence the exclusionary rule provides, would cause chaos in the trial and appellate courts, and would fail to ameliorate—and in most cases would exacerbate—the unfortunate side effects of the exclusionary rule which critics have set forth to date.

IV.

There is no reason in law or policy to distinguish between trial and habeas corpus in applying the exclusionary rule.

What petitioners could not accomplish at trial, this Court should not permit them to achieve by limiting collateral attack. *Kaufman v. United States*, 394 U.S. 217 (1969), one of a number of cases which petitioners ask the Court to overrule (Petitioners' Brief in *Bustamonte* at 25), is of only marginal relevance to the issue now before the Court. (In *Kaufman*, this Court recognized the right of federal prisoners to raise exclusionary rule issues collaterally.) Petitioners' argument to make claims based on the exclusionary rule unavailable to state prisoners in federal habeas corpus strikes at the very heart of the Court's extensive development of the Great Writ. Cf. *Moore v. Dempsey*, 261 U.S. 86 (1923); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Brown v. Allen*, 344 U.S. 443 (1953); *Fay v. Noia*, 372 U.S. 391 (1963).

We need not duplicate respondent's excellent, concise history of the development of the Writ (Respondent's Brief in *Bustamonte* at 21-28). We shall only highlight by noting that the point at which the Court turned the corner on opening federal habeas corpus "to inquire into every constitutional defect in any criminal trial" (*Williams v. United States*, 401 U.S. 646, 685 (1971) (Harlan, J., concurring and dissenting)) occurred definitively in *Brown v. Allen*, *supra*, which in turn was largely guided by the result in *Moore v. Dempsey*. *Kaufman* is no more than a recent, logical application to collateral attacks by federal prisoners of the

principles set out in *Moore, Brown, and Fay v. Noia, inter alia*.

Recent growth in the habeas corpus docket of the federal courts can be traced in large part to elaborate judicial development of the substantive meaning of the Fourth Amendment. Constitutional issues in criminal proceedings have become more complex since *Brown v. Allen* and have created greater divisions within the Court, thereby spawning more extensive litigation. But the basic principle of *Moore* and *Brown* and the policy reasons which support it (ably presented in Respondent's Brief in *Bustamonte* at 28-31) have remained unchanged. To exclude exclusionary rule claims from consideration in collateral attack would remove from federal district court jurisdiction many of the constitutional issues which have arisen in criminal proceedings in the last decade, most of which find no other vehicle to reach the federal courts. The Court would deprive litigants of a lower federal forum for the resolution of these complex constitutional issues and, at the same time, would increase pressure on its own docket to resolve these issues itself on appeals from state courts. Even the most outspoken critics of the exclusionary rule have conceded its virtue as:

... a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. *Oaks, op. cit. supra*, at 756.

Petitioners further muddy the water by taking out of context the words of California Chief Justice Roger Traynor in *In re Sterling*, 63 Cal.2d 486, 47 Cal. Rptr. 205, 407 P.2d 5 (1965) (Petitioners' Brief in *Bustamonte* at 26-27). In *Sterling*, petitioners' request for *state* habeas corpus relief was denied after direct appeals on the identical constitutional issue had been turned down. Chief Justice Traynor noted that petitioners had had their day in state courts on the issue, and that petitioners' proper remedy lay in federal habeas corpus. Far from supporting Petitioners in the instant case, *Sterling* indicates the reliance of state court judges on the federal district court habeas corpus jurisdiction to give federal answers to federal questions.

What deterrence occurs as a result of the exclusionary rule, occurs equally whether the final judicial word in a given case comes from this Court, a federal district court, a state supreme court, a trial court, or from the prosecutor's office when a case is "no-papered." The issue of how a court's pronouncements on the exclusionary rule reach the police officer on the beat is not affected by which court renders the final judgment, but rather by factors pertaining to internal police administration. Petitioners have come up with no new distinctions of law in this case; they are very simply attempting to have the Court gut the exclusionary rule through a circuitous route. Their objective is wrong, for the reasons set out in Parts I to III of this brief. Their tactic requires the rewriting of federal law on habeas corpus and has been repeatedly determined by this Court to be fundamentally unsound.

CONCLUSION

In *California v. Krivda*, No. 71-651, amici respectfully request this Court, should it reach the issues, to affirm the decision on federal constitutional grounds.

In *Schneckloth v. Bustamonte*, No. 71-732, amici respectfully request this Court to affirm the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

HEATHCOTE W. WALES
Georgetown University
Law Center
Washington, D.C. 20001

MELVIN L. WULF
SANFORD J. ROSEN
JOEL M. GORA
American Civil Liberties Union
Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Amici Curiae

RICHARD E. POSELL
1888 Century Park East
Suite 1010
Los Angeles, California 90067

A. L. WIRIN
FRED OKRAND
LAWRENCE R. SPERBER
American Civil Liberties Union
of Southern California
257 South Spring Street
Los Angeles, California 90012

Of Counsel

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SUPREME COURT OF THE UNITED STATES

Syllabus

SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT *v.* BUSTAMONTE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-732. Argued October 10, 1972—Decided May 29, 1973

During the course of a consented search of a car that had been stopped by officers for traffic violations, evidence was discovered that was used to convict respondent of unlawfully possessing a check. In a habeas corpus proceeding, the Court of Appeals, reversing the District Court, held that the prosecution had failed to prove that consent to the search had been made with the understanding that it could freely be withheld. *Held*: When the subject of a search is not in custody and the State would justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntary; voluntariness is to be determined from the totality of the surrounding circumstances. While knowledge of a right to refuse consent is a factor to be taken into account, the State need not prove that the one giving permission to search knew that he had a right to withhold his consent. Pp. 5-31.

448 F. 2d 699, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion. POWELL, J., filed a concurring opinion, in which BURGER, C. J., and REHNQUIST, J., joined. DOUGLAS, BRENNAN, and MARSHALL, JJ., filed dissenting opinions.

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SUPREME COURT OF THE UNITED STATES

No. 71-732

Merle R. Schneckloth, Superintendent, California Conservation Center,
Petitioner,

v.

Robert Clyde Bustamonte.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 29, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is "per se unreasonable . . .—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U. S. 347, 357; *Coolidge v. New Hampshire*, 403 U. S. 443, 454-455; *Chambers v. Maroney*, 399 U. S. 42, 51. It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. *Davis v. United States*, 328 U. S. 582, 593-594; *Zap v. United States*, 328 U. S. 624, 630. The constitutional question in the present case concerns the definition of "consent" in this Fourth and Fourteenth Amendment context.

I

The respondent was brought to trial in a California court upon a charge of possessing a check with intent to defraud.¹ He moved to suppress the introduction of

¹ Calif. Penal Code § 475 (a).

certain material as evidence against him on the ground that the material had been acquired through an unconstitutional search and seizure. In response to the motion, the trial judge conducted an evidentiary hearing where it was established that the material in question had been acquired by the State under the following circumstances:

While on routine patrol in Sunnyvale, California, at approximately 2:40 in the morning, Police Officer James Rand stopped an automobile when he observed that one headlight and its license plate light were burned out. Six men were in the vehicle. Joe Alcala and the respondent, Robert Bustamonte, were in the front seat with Joe Gonzales, the driver. Three older men were seated in the rear. When, in response to the policeman's question, Gonzales could not produce a driver's license, Officer Rand asked if any of the other five had any evidence of identification. Only Alcala produced a license, and he explained that the car was his brother's. After the six occupants had stepped out of the car at the officer's request and after two additional policemen had arrived, Officer Rand asked Alcala if he could search the car. Alcala replied, "Sure, go ahead." Prior to the search no one was threatened with arrest and, according to Officer Rand's uncontradicted testimony, it "was all very congenial at this time." Gonzales testified that Alcala actually helped in the search of the car, by opening the trunk and glove compartment. In Gonzales' words: ". . . the police officer asked Joe [Alcala], he goes, 'Does the trunk open?' And Joe said, 'Yes.' He went to the car and got the keys and opened up the trunk." Wadded up under the left rear seat, the police officers found three checks that had previously been stolen from a car wash.

The trial judge denied the motion to suppress, and the checks in question were admitted in evidence at

Bustamonte's trial. On the basis of this and other evidence he was convicted, and the California Court of Appeal for the First Appellate District affirmed the conviction. 270 Cal. App. 2d 648, 76 Cal. Rptr. 17. In agreeing that the search and seizure were constitutionally valid, the appellate court applied the standard earlier formulated by the Supreme Court of California in an opinion by then Justice Traynor: "Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances." *People v. Michael*, 45 Cal. 2d 751, 753, 290 P. 2d 852, 854. The appellate court found that "[i]n the instant case the prosecution met the necessary burden of showing consent . . . since there were clearly circumstances from which the trial court could ascertain that consent had been freely given without coercion or submission to authority. Not only Officer Rand, but Gonzales, the driver of the automobile, testified that Alcalá's assent to the search of his brother's automobile was freely given. At the time of the request to search the automobile, the atmosphere, according to Rand, was 'congenial' and there had been no discussion of any crime. As noted, Gonzales said Alcalá even attempted to aid in the search." 270 Cal. App. 2d, at 652, 76 Cal. Rptr., at 20. The California Supreme Court denied review.²

Thereafter, the respondent sought a writ of habeas corpus in a federal district court. It was denied.³ On appeal, the Court of Appeals for the Ninth Circuit, relying on its prior decisions in *Cypres v. United States*, 343 F. 2d 95, and *Schoepflin v. United States*, 391 F. 2d 390, set aside the District Court's order. 448 F. 2d 699. The appellate court reasoned that a consent was a waiver

² The order of the California Supreme Court is unreported.

³ The decision of the District Court is unreported.

of a person's Fourth and Fourteenth Amendment rights, and that the State was under an obligation to demonstrate not only that the consent had been uncoerced, but that it had been given with an understanding that it could be freely and effectively withheld. Consent could not be found, the court held, solely from the absence of coercion and a verbal expression of assent. Since the District Court had not determined that Alcala had *known* that his consent could be withheld and that he could have refused to have his vehicle searched, the Court of Appeals vacated the order denying the writ and remanded the case for further proceedings. We granted the State's petition for certiorari to determine whether the Fourth and Fourteenth Amendments require the showing thought necessary by the Court of Appeals. 405 U. S. 953.

II

It is important to make it clear at the outset what is not involved in this case. The respondent concedes that a search conducted pursuant to a valid consent is constitutionally permissible. In *Katz v. United States*, 389 U. S. 347, 358, and more recently in *Vale v. Louisiana*, 399 U. S. 30, 35, we recognized that a search authorized by consent is wholly valid. See also *Davis v. United States*, *supra*, at 593-594; *Zap v. United States*, *supra*, at 630.⁴ And similarly the State concedes that "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given."

⁴ "One would expect a hard-headed system like the common law to recognize exceptions even to the most comprehensive principle for safeguarding liberty. This is true of the prohibition of all searches and seizures as unreasonable unless authorized by a judicial warrant appropriately supported." *Davis v. United States*, 328 U. S. 582, 609 (Frankfurter, J., dissenting).

Bumper v. North Carolina, 391 U. S. 543, 548. See also *Johnson v. United States*, 333 U. S. 10; *Amos v. United States*, 255 U. S. 313.

The precise question in this case, then, is what must the state prove to demonstrate that a consent was "voluntarily" given. And upon that question there is a square conflict of views between the state and federal courts that have reviewed the search involved in the case before us. The Court of Appeals for the Ninth Circuit concluded that it is an essential part of the State's initial burden to prove that a person knows he has a right to refuse consent. The California courts have followed the rule that voluntariness is a question of fact to be determined from the totality of all the circumstances, and that the state of a defendant's knowledge is only one factor to be taken into account in assessing the voluntariness of a consent. See, *e. g.*, *People v. Tremayne*, 98 Cal. Rptr. 193, 20 Cal. App. 3d 1006; *People v. Roberts*, 55 Cal. Rptr. 62, 246 Cal. App. 2d 715.

A

The most extensive judicial exposition of the meaning of "voluntariness" has been developed in those cases in which the Court has had to determine the "voluntariness" of a defendant's confession for purposes of the Fourteenth Amendment. Almost 40 years ago, in *Brown v. Mississippi*, 297 U. S. 278, the Court held that a criminal conviction based upon a confession obtained by brutality and violence was constitutionally invalid under the Due Process Clause of the Fourteenth Amendment. In some 30 different cases decided during the era that intervened between *Brown* and *Escobedo v. Illinois*, 378 U. S. 478, the Court was faced with the necessity of determining whether in fact the confessions in

issue had been "voluntarily" given.⁵ It is to that body of case law to which we turn for initial guidance on the meaning of "voluntariness" in the present context.⁶

Those cases yield no talismanic definition of "voluntariness," mechanically applicable to the host of situations where the question has arisen. "The notion of 'voluntariness,'" Mr. Justice Frankfurter once wrote, "is itself an amphibian." *Culombe v. Connecticut*, 367 U. S. 568, 604-605. It cannot be taken literally to mean a "knowing" choice. "Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are 'voluntary' in the sense of representing a choice of alternatives. On the other hand, if 'voluntariness' incorporates notions of 'but-for' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind."⁷ It is thus evident that neither

⁵ See *Miranda v. Arizona*, 384 U. S. 436, 507 and n. 3 (Harlan, J., dissenting); *Spano v. New York*, 360 U. S. 315, 321 n. 2 (citing 28 cases).

⁶ Similarly, when we recently considered the meaning of a "voluntary" guilty plea, we returned to the standards of "voluntariness" developed in the coerced confession cases. See *Brady v. United States*, 397 U. S. 742, 749. See also n. 25, *infra*.

⁷ Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 Colum. L. Rev. 62, 72-73. See also 3 J. Wigmore, *Evidence*, § 826 (Chadbourn rev. 1970): "When, for example, threats are used, the situation is one of choice between alternatives, either one disagreeable, to be sure, but still subject to a choice. As between the rack and a confession, the latter would usually be considered the less disagreeable; but it is nonetheless a voluntary choice."

linguistics nor epistemology will provide a ready definition of the meaning of "voluntariness."

Rather, "voluntariness" has reflected an accommodation of the complex of values implicated in police questioning of a suspect. At one end of the spectrum, is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. See *Culombe v. Connecticut*, *supra*, at 578-580. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. *Haynes v. Washington*, 373 U. S. 503, 515. At the other end of the spectrum, is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice. "[I]n cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will." *Blackburn v. Alabama*, 361 U. S. 199, 206-207. See also *Culombe v. Connecticut*, *supra*, at 581-584; *Chambers v. Florida*, 309 U. S. 227, 235-238.

This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty. The Due Process Clause does not mandate that the police forego all questioning, nor that they be given carte blanche to extract what they can from a suspect. "The ultimate test remains that which has been the only clearly established test in Anglo-American Courts for two hundred years: the test of voluntariness.

Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Culombe v. Connecticut, supra*, at 602.

In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, *e. g.*, *Haley v. Ohio*, 332 U. S. 596; his lack of education, *e. g.*, *Payne v. Arkansas*, 356 U. S. 560; or his low intelligence, *e. g.*, *Fikes v. Alabama*, 352 U. S. 191; the lack of any advice to the accused of his constitutional rights, *e. g.*, *Davis v. North Carolina*, 384 U. S. 737; the length of detention, *e. g.*, *Chambers v. Florida, supra*; the repeated and prolonged nature of the questioning, *e. g.*, *Ashcraft v. Tennessee*, 322 U. S. 143; and the use of physical punishment such as the deprivation of food or sleep, *e. g.*, *Reck v. Pate*, 367 U. S. 433.* In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted. *Culombe v. Connecticut, supra*, at 603.

The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful

* See generally *Miranda v. Arizona*, 384 U. S. 436, 508 (Harlan, J., dissenting); 3 J. Wigmore, *Evidence* § 826 (Chadbourn rev. 1970); Note, *Developments in the Law: Confessions*, 79 Harv. L. Rev. 938, 954-984.

scrutiny of all the surrounding circumstances. See *Miranda v. Arizona*, 384 U. S. 436, 508 (Harlan, J., dissenting); *id.*, at 534-535 (WHITE, J., dissenting). In none of them did the Court rule that the Due Process Clause required the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put. While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the "voluntariness" of an accused's responses, they were not in and of themselves determinative. See, e. g., *Davis v. North Carolina*, *supra*; *Haynes v. Washington*, *supra*, at 510-511; *Culombe v. Connecticut*, *supra*, at 610; *Turner v. Pennsylvania*, 338 U. S. 62, 64.

B

Similar considerations lead us to agree with the courts of California that the question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a "voluntary" consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.

In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.⁹ In

⁹ See Note, Consent Searches: A Reappraisal After *Miranda v. Arizona*, 67 Colum. L. Rev. 130, 130-131.

the present case for example, while the police had reason to stop the car for traffic violations, the State does not contend that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants.¹⁰ Yet, the search yielded tangible evidence that served as a basis for a prosecution, and provided some assurance that others, wholly innocent of the crime, were not mistakenly brought to trial. And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.

But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion were applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in *Boyd v. United States*, 116 U. S. 616, 635:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight

¹⁰ If there had been probable cause for the search of the automobile, a search warrant would not have been necessary in this case. See *Brinegar v. United States*, 338 U. S. 160; *Carroll v. United States*, 267 U. S. 132.

deviations from legal modes of procedures. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity. Just as was true with confessions, the requirement of a "voluntary" consent reflects a fair accommodation of the constitutional requirements involved. In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches. In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of "voluntariness."

The approach of the Court of Appeals for the Ninth Circuit finds no support in any of our decisions that have attempted to define the meaning of "voluntariness." Its ruling, that the State must affirmatively prove that the subject of the search knew that he had a right to refuse

consent, would, in practice, create serious doubt whether consent searches could continue to be conducted. There might be rare cases where it could be proved from the record that a person in fact affirmatively knew of his right to refuse—such as a case where he announced to the police that if he didn't sign the consent form, "you [police] are going to get a search warrant;"¹¹ or a case where by prior experience and training a person had clearly and convincingly demonstrated such knowledge.¹² But more commonly where there was no evidence of any coercion, explicit or implicit, the prosecution would nevertheless be unable to demonstrate that the subject of the search in fact had known of his right to refuse consent.

The very object of the inquiry—the nature of a person's subjective understanding—underlines the difficulty of the prosecution's burden under the rule applied by the Court of Appeals in this case. Any defendant who was the subject of a search authorized solely by his consent could effectively frustrate the introduction into evidence of the fruits of that search by simply failing to testify that he in fact knew he could refuse to consent. And the near impossibility of meeting this prosecutorial burden suggests why this Court has never accepted any such litmus-paper test of voluntariness. It is instructive to recall the fears of then Justice Traynor of the California Supreme Court:

"[I]t is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the

¹¹ *United States v. Curiale*, 414 F. 2d 744, 747.

¹² *Cf. Rosenthal v. Henderson*, 389 F. 2d 514, 516.

evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority." *People v. Michael, supra*, at 754, 290 P. 2d, at 854.

One alternative that would go far towards proving that the subject of a search did know he had a right to refuse consent would be to advise him of that right before eliciting his consent. That, however, is a suggestion that has been almost universally repudiated by both federal¹³ and state courts,¹⁴ and, we think, rightly so. For it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement

¹³ See, e. g., *Gorman v. United States*, 380 F. 2d 158, 164 (CA1); *United States ex rel. Cole v. Mancusi*, 429 F. 2d 61, 66 (CA2); *United States ex rel. Harris v. Hendricks*, 423 F. 2d 1096, 1101 (CA3); *United States v. Vickers*, 387 F. 2d 703, 707 (CA4); *United States v. Goosbey*, 419 F. 2d 818 (CA6); *United States v. Noa*, 443 F. 2d 144, 147 (CA9); *Leeper v. United States*, 446 F. 2d 281, 284 (CA10). But see, *United States v. Nikrasch*, 367 F. 2d 740, 744 (CA7); *United States v. Moderacki*, 280 F. Supp. 633 (Del.); *United States v. Blalock*, 255 F. Supp. 268 (ED Pa.). While there is dicta in *Nikrasch* to the effect that warnings are necessary for an effective Fourth Amendment consent, the Court of Appeals for the Seventh Circuit subsequently recanted that position and termed it "of dubious propriety." *Byrd v. Lane*, 398 F. 2d 750, 755. The Court of Appeals limited *Nikrasch* to its facts—a case where a suspect arrested on a disorderly conduct charge and incarcerated for eight hours "consented" from his jail cell to a search of his car.

¹⁴ See, e. g., *People v. Roberts*, 246 Cal. App. 2d 715, 55 Cal. Rptr. 62; *People v. Dahlke*, 257 Cal. App. 2d 82, 64 Cal. Rptr. 599; *State v. Custer*, 251 So. 2d 287 (Fla. Ct. App.); *State v. Oldham*, 92 Id. 124, 438 P. 2d 275; *State v. McCarty*, 199 Kan. 116, 427 P. 2d 616, vacated in part on other grounds, 392 U. S. 308; *Hohnke v. Commonwealth*, 451 S. W. 2d 162 (Ky. Ct. App.); *State v. Andrus*, 250 La. 765, 199 So. 2d 867; *Morgan v. State*, 2 Md. App. 440, 234 A. 2d 762; *State v. Witherspoon*, 460 S. W. 2d 281 (Mo.); *State v. Forney*, 181 Neb. 757, 150 N. W. 2d 915; *State v. Douglas*, 488 P. 2d 1366 (Or.).

agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights. Cf. *Boykin v. Alabama*, 395 U. S. 238, 243. And, while surely a closer question, these situations are still immeasurably far removed from "custodial interrogation" where, in *Miranda v. Arizona*, *supra*, we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation. Indeed, in language applicable to the typical consent search, we refused to extend the need for warnings:

"Our decision is not intended to hamper the traditional function of police officers in investigating crime When an individual is in custody on probable cause, the policy may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." *Id.*, at 477-478.

Consequently, we cannot accept the position of the Court of Appeals in this case that proof of knowledge of the right to refuse consent is a necessary prerequisite to demonstrating a "voluntary" consent. Rather, it is

only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced. It is this careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches.

For example, in *Davis v. United States, supra*, federal agents enforcing war-time gasoline rationing regulations, arrested a filling station operator and asked to see his rationing coupons. He eventually unlocked a room where the agents discovered the coupons that formed the basis for his conviction. The District Court found that the petitioner had consented to the search—that although he had at first refused to turn the coupons over, he had soon been persuaded to do so and that force or threat of force had not been employed to persuade him. Concluding that it could not be said that this finding was erroneous, this Court, in an opinion by MR. JUSTICE DOUGLAS that looked to all the circumstances surrounding the consent, affirmed the judgment of conviction: "The public character of the property, the fact that the demand was made during business hours at the place of business where the coupons were required to be kept, the existence of the right to inspect, the nature of the request, the fact that the initial refusal to turn the coupons over was soon followed by acquiescence in the demand—these circumstances all support the conclusion of the District Court." *Id.*, at 593-594. See also *Zap v. United States, supra*.

Conversely, if under all the circumstances it has appeared that the consent was not given voluntarily—that it was coerced by threats or force, or granted only in submission to a claim of lawful authority—then we have found the consent invalid and the search unreasonable. See, e. g., *Bumper v. North Carolina, supra*, at 548-549; *Johnson v. United States, supra*; *Amos v. United States, supra*. In *Bumper*, a 66-year-old Negro widow, who lived in a house located in a rural area at the end of an

isolated mile-long dirt road, allowed four white law enforcement officials to search her home after they asserted they had a warrant to search the house. We held the alleged consent to be invalid, noting that "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Id.*, at 550.

Implicit in all of these cases is the recognition that knowledge of a right to refuse is not a prerequisite of a voluntary consent. If the prosecution were required to demonstrate such knowledge, *Davis* and *Zap* could not have found consent without evidence of that knowledge. And similarly if the failure to prove such knowledge were sufficient to show an ineffective consent, the *Amos*, *Johnson*, and *Bumper* opinions would surely have focused upon the subjective mental state of the person who consented. Yet they did not.

In short, neither this Court's prior cases, nor the traditional definition of "voluntariness" requires proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search.¹⁵

¹⁵ This view is bolstered by *Coolidge v. New Hampshire*, 403 U. S. 443. There the Court determined that a suspect's wife was not operating as an agent of the State when she handed over her husband's guns and clothing to the police. We found nothing constitutionally suspect in the subjective forces that impelled the spouse to cooperate with the police. "Among these are the simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful to the absent spouse." *Id.*, at 488. "The test . . . is whether Mrs. Coolidge, in light of all the circumstances of the case must be regarded as having acted as an 'instrument' or agent of the state when she produced her husband's belongings." *Id.*, at 487.

Just as it was necessary in *Coolidge* to analyze the totality of the surrounding circumstances to assess the validity of Mrs. Coolidge's

C

It is said, however, that a "consent" is a "waiver" of a person's rights under the Fourth and Fourteenth Amendments. The argument is that by allowing the police to conduct a search, a person "waives" whatever right he had to prevent the police from searching. It is argued that under the doctrine of *Johnson v. Zerbst*, 304 U. S. 458, 464, to establish such a "waiver" the state must demonstrate "an intentional relinquishment or abandonment of a known right or privilege."

But these standards were enunciated in *Johnson* in the context of the safeguards of a fair criminal trial. Our cases do not reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection. As Mr. Justice Black once observed for the Court: "Waiver" is a vague term used for a great variety of purposes, good and bad, in the law." *Green v. United States*, 355 U. S. 184, 191. With respect to procedural due process, for example, the Court has acknowledged that waiver is possible, while explicitly leaving open the question whether a "knowing and intelligent" waiver need be shown.¹⁸ See *D. H. Overmeyer Co. v. Frick Co.*,

offer of evidence, it is equally necessary to assess all the circumstances surrounding a search where consent is obtained in response to an initial police question.

¹⁸ *Johnson* itself relied on three civil cases, but none of those cases established the proposition that a waiver, to be effective, must be knowing and intelligent. *Hodges v. Easton*, 106 U. S. 408, which concerned the waiver of a civil jury trial by the submission of a special verdict to the jury, indicates only that "every reasonable presumption should be indulged against . . . waiver." *Id.*, at 412. *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389, is to the same effect. *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U. S. 292, which involved the possible waiver of procedural due process rights, stands only for the proposition that: "We do not presume acquiescence in the loss of fundamental rights." *Id.*, at 307.

405 U. S. 174, 185-186; *Fuentes v. Shevin*, 407 U. S. 67, 94-96.¹⁷

The requirement of a "knowing" and "intelligent" waiver was articulated in a case involving the validity of a defendant's decision to forgo a right constitutionally guaranteed to protect a fair trial and the reliability of the truth-determining process. *Johnson v. Zerbst*, *supra*, dealt with the denial of counsel in a federal criminal trial. There the Court held that under the Sixth Amendment a criminal defendant is entitled to the assistance of counsel, and that if he lacks sufficient funds to retain counsel, it is the Government's obligation to furnish him with a lawyer. As Mr. Justice Black wrote for the Court: "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious." *Id.*, at 462-463 (footnote omitted). To preserve the fairness of the trial process the Court established an appropriately heavy burden on the government before waiver could be found—"an in-

¹⁷ Cf. *Parden v. Terminal R. Co.*, 377 U. S. 184 (operation of common carrier railroad found to be waiver of State's sovereign immunity despite objection that there was no "waiver" under *Johnson*); *National Equipment Rental, Ltd. v. Szukhent*, 375 U. S. 311 (valid waiver of procedural due process found over objection of no compliance with *Johnson*). See also *Employees of the Dept. of Public Health and Welfare v. Department of Public Health and Welfare*, — U. S. —, — (MARSHALL, J., concurring).

tentional relinquishment or abandonment of a known right or privilege." *Id.*, at 464.

Almost without exception the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.¹⁸ Hence, and hardly surprisingly in view of the facts of *Johnson* itself, the standard of a knowing and intelligent waiver has most often been applied to test the validity of a waiver of counsel, either at trial,¹⁹ or upon a guilty plea.²⁰ And the Court has also applied the *Johnson* criteria to assess the effectiveness of a waiver of other trial rights such as the right to confrontation,²¹ to a jury trial,²² and to a speedy trial,²³ and the right to be free from twice being placed in jeopardy.²⁴ Guilty pleas have been carefully scrutinized to determine whether the accused

¹⁸ One apparent exception was *Marchetti v. United States*, 390 U. S. 39, 51-52, where we found no meaningful waiver of the privilege against compulsory self-incrimination when a gambler was forced to pay a wagering tax. We reasoned that there could be no choice when the gambler was faced with the alternative of giving up gambling or providing incriminatory information. Analytically, therefore, although the Court cited *Johnson*, *Marchetti* turned on the lack of a "voluntary" waiver rather than the lack of any "knowing" and "intelligent" waiver.

¹⁹ See, e. g., *Glasser v. United States*, 315 U. S. 60; *Adams v. United States ex rel. McCann*, 317 U. S. 269; *Carnley v. Cochran*, 369 U. S. 506; cf. *Chessman v. Teets*, 354 U. S. 156 (no waiver of counsel shown at settlement of state court record).

²⁰ See, e. g., *Von Moltke v. Gillies*, 332 U. S. 708; *Uveges v. Pennsylvania*, 335 U. S. 437; *Moore v. Michigan*, 355 U. S. 155; *Boyd v. Dutton*, 405 U. S. 1.

²¹ See, e. g., *Brookhart v. Janis*, 384 U. S. 1; *Barber v. Page*, 390 U. S. 719.

²² See, e. g., *Adams v. United States ex rel. McCann*, *supra*.

²³ See, e. g., *Barker v. Wingo*, 407 U. S. 514.

²⁴ See, e. g., *Green v. United States*, *supra*.

knew and understood all the rights to which he would be entitled at trial, and that he had intentionally chosen to forgo them.²⁵ And the Court has evaluated the knowing and intelligent nature of the waiver of trial rights in trial-type situations, such as the waiver of the privilege against compulsory self-incrimination before an administrative agency²⁶ or a congressional committee,²⁷ or the waiver of counsel in a juvenile proceeding.²⁸

The guarantees afforded a criminal defendant at trial also protect him at certain stages before the actual trial, and any alleged waiver must meet the strict standard of an intentional relinquishment of a "known" right. But the "trial" guarantees that have been applied to the "pre-trial" stage of the criminal process are similarly designed to protect the fairness of the trial itself.

Hence, in *United States v. Wade*, 388 U. S. 218, and *Gilbert v. California*, 388 U. S. 263, the Court held "that

²⁵ See, e. g., *McCarthy v. United States*, 394 U. S. 459; *Boykin v. Alabama*, 395 U. S. 238.

Our cases concerning the validity of guilty pleas underscore the fact that the question whether a person has acted "voluntarily" is quite distinct from the question whether he has "waived" a trial right. The former question, as we made clear in *Brady v. United States*, 397 U. S. 742, 749, can be answered only by examining all the relevant circumstances to determine if he has been coerced. The latter question turns on the extent of his knowledge. We drew the same distinction in *McMann v. Richardson*, 397 U. S. 759, 766:

"A conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the acts with which he is charged. . . . That admission may not be compelled, and since the plea is also a waiver of trial—and unless the applicable law otherwise provides, a waiver of the right to contest the admissibility of any evidence the State might have offered against the defendant—it must be an intelligent act 'done with sufficient awareness of the relevant circumstances and likely consequences.'" (Footnote omitted.)

²⁶ See, e. g., *Smith v. United States*, 337 U. S. 137.

²⁷ See, e. g., *Emspak v. United States*, 349 U. S. 190.

²⁸ See *In re Gault*, 387 U. S. 1, 42.

a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth [and Fourteenth] Amendment right to counsel . . .” *Gilbert v. California, supra*, at 272. Accordingly, the Court indicated that the standard of a knowing and intelligent waiver must be applied to test the waiver of counsel at such a lineup. See *United States v. Wade, supra*, at 237. The Court stressed the necessary interrelationship between the presence of counsel at a post-indictment lineup before trial and the protection of the trial process itself:

“Insofar as the accused’s conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. *Pointer v. Texas*, 380 U. S. 400. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused’s fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—‘that’s the man.’” *Id.*, at 235-236.

And in *Miranda v. Arizona*, *supra*, the Court found that *custodial* interrogation by the police was inherently coercive, and consequently held that detailed warnings were required to protect the privilege against compulsory self-incrimination. The Court made it clear that the basis for decision was the need to protect the fairness of the trial itself:

"That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding process in court. The presence of an attorney and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel, 'all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.'" *Id.*, at 466.

The standards of *Johnson* were, therefore, found to be a necessary prerequisite to a finding of a valid waiver. See, *id.*, at 475-479. Cf. *Escobedo v. Illinois*, *supra*, at 490 n. 14.²⁹

²⁹ As we have already noted, *supra*, p. —, *Miranda* itself involved interrogation of a suspect detained in custody and did not concern the investigatory procedures of the police in general on-the-scene questioning. 394 U. S., at 477.

By the same token, the present case does not require a determination of the proper standard to be applied in assessing the validity of a search authorized solely by an alleged consent that is

There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a "knowing" and "intelligent" waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.

A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided. A prime example is the right to counsel. For without that right, a wholly innocent accused faces the real and substantial danger that simply because of his lack of legal expertise he may be convicted. As Justice Harlan once wrote: "The sound reason why [the right to counsel] is so freely extended for a criminal trial is the severe injustice risked by confronting an untrained defendant with a range of technical points of law, evidence, and tactics familiar to the prosecutor but not to himself." *Miranda v. Arizona*, *supra*, at 514 (dissenting opinion). The Constitution requires that every effort be made to see to it that a defendant in a criminal case

obtained from a person after he has been placed in custody. We do note, however, that other courts have been particularly sensitive to the heightened possibilities for coercion when the "consent" to a search was given by a person in custody. See, e. g., *Judd v. United States*, 190 F. 2d 649, 651; *Channel v. United States*, 285 F. 2d 217; *Villano v. United States*, 310 F. 2d 680, 684; *United States v. Marrese*, 336 F. 2d 501.

has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial.³⁰

The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. Rather, as Mr. Justice Frankfurter's opinion for the Court put it in *Wolf v. Colorado*, 338 U. S. 25, 27, the Fourth Amendment protects the "security of one's privacy against arbitrary intrusion by the police. . . ." In declining to apply the exclusionary rule of *Mapp v. Ohio*, 367 U. S. 643, to convictions that had become final before rendition of that decision, the Court emphasized that "there is no likelihood of unreliability or coercion present in a search-and-seizure case," *Linkletter v. Walker*, 381 U. S. 618, 638. In *Linkletter*, the Court indicated that those cases that had been given retroactive effect went to "the fairness of the trial—the very integrity of the fact-finding process. Here . . . the fairness of the trial is not under attack." *Id.*, at 639. The Fourth Amendment "is not an adjunct to the ascertainment of truth." The guarantees of the Fourth Amendment stand "as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect." *Tehan v. United States ex rel. Schott*, 382 U. S. 406, 416.

Nor can it even be said that a search, as opposed to an eventual trial, is somehow "unfair" if a person consents to a search. While the Fourth and Fourteenth

³⁰ "[In] the uniformly structured situation of the defendant whose case is formally called for plea or trial, where, with everything to be gained by the presence of counsel and no interest deserving consideration to be lost, an inflexible rule serves well." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 950.

Amendments limit the circumstances under which the police can conduct a search, there is nothing constitutionally suspect in a person voluntarily allowing a search. The actual conduct of the search may be precisely the same as if the police had obtained a warrant. And, unlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment. We have only recently stated: "[I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Coolidge v. New Hampshire, supra*, at 488. Rather the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.

Those cases that have dealt with the application of the *Johnson v. Zerbst* rule make clear that it would be next to impossible to apply to a consent search the standard of "an intentional relinquishment or abandonment of a known right or privilege."³¹ To be true to *Johnson*

³¹ While we have occasionally referred to a consent search as a "waiver," we have never used that term to mean "an intentional relinquishment or abandonment of a known right or privilege." Hence, for example, in *Johnson v. United States, supra*, this Court found the consent to be ineffective: "Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." *Id.*, at 13. While the Court spoke in terms of "waiver" it arrived at the conclusion that there had been no "waiver" from an analysis of the totality of the objective circumstances—not from the absence of any express indication of Johnson's knowledge of a right to refuse or the lack of explicit warnings. See also *Amos v. United States, supra*.

and its progeny, there must be examination into the knowing and understanding nature of the waiver, an examination that was designed for a trial judge in the structured atmosphere of a courtroom. As the Court expressed it in *Johnson*:

"The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." 304 U. S., at 465.³²

It would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman,

³² The Court was even more explicit in *Von Moltke v. Gillies*, *supra*, at 723-724:

"To discharge this duty [of assuring the intelligent nature of the waiver] properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered."

upon pain of tainting the evidence obtained, could make the detailed type of examination demanded by *Johnson*. And, if for this reason a diluted form of "waiver" were found acceptable, that would itself be ample recognition of the fact that there is no universal standard that must be applied in every situation where a person forgoes a constitutional right.³³

Similarly, a "waiver" approach to consent searches would be thoroughly inconsistent with our decisions that have approved "third party consents." In *Coolidge v. New Hampshire, supra*, at 487-490, where a wife surrendered to the police guns and clothing belonging to her husband, we found nothing constitutionally impermissible in the admission of that evidence at trial since the wife had not been coerced. *Frazier v. Cupp*, 394 U. S. 731, 740, held that evidence seized from the defendant's duffel bag in a search authorized by his cousin's consent was admissible at trial. We found that the defendant had assumed the risk that his cousin with whom he shared the bag would allow the police to search it. See also *Abel v. United States*, 362 U. S. 217. And in *Hill v. California*, 401 U. S. 797, 802-805, we held that the police had validly seized evidence from the petitioner's apartment incident to the arrest of a third

³³ It seems clear that even a limited view of the demands of "an intentional relinquishment or abandonment of a known right or privilege" standard would inevitably lead to a requirement of detailed warnings before any consent search—a requirement all but universally rejected to date. See nn. 13 and 14, *supra*. As the Court stated in *Miranda* with respect to the privilege against compulsory self-incrimination: "[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact." *Miranda v. Arizona, supra*, at 468-469 (footnote omitted). See *United States v. Moderacki*, 280 F. Supp. 633; *United States v. Blalock*, 255 F. Supp. 268.

party, since the police had probable cause to arrest the petitioner and reasonably though mistakenly believed the man they had arrested was he. Yet it is inconceivable that the Constitution could countenance the waiver of a defendant's right to counsel by a third party, or that a waiver could be found because a trial judge reasonably though mistakenly believed a defendant had waived his right to plead not guilty.³⁴

In short, there is nothing in the purposes or application of the waiver requirements of *Johnson v. Zerbst* that justifies, much less compels, the easy equation of a knowing waiver with a consent search. To make such an equation is to generalize from the broad rhetoric of some of our decisions, and to ignore the substance of the differing constitutional guarantees. We decline to follow what one judicial scholar has termed "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation."³⁵

D

Much of what has already been said disposes of the argument that the Court's decision in the *Miranda* case requires the conclusion that knowledge of a right to refuse is an indispensable element of a valid consent. The considerations that informed the Court's holding in *Miranda* are simply inapplicable in the present case. In *Miranda* the Court found that the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation. The

³⁴ Our decision today is, of course, concerned with what constitutes a valid consent, not who can consent. But, the constitutional validity of third-party consents demonstrates the fundamentally different nature of a consent search from the waiver of a trial right.

³⁵ Friendly, *supra*, n. 30, at 950.

Court concluded that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 U. S., at 458. And at another point the Court noted that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.*, at 467.

In this case there is no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place. Indeed, since consent searches will normally occur on a person's own familiar territory, the spectre of incommunicado police interrogation in some remote station house is simply inapposite.³⁶ There is no reason to believe, under circumstances such as are present here, that the response to a policeman's question is presumptively coerced; and there is, therefore, no reason to reject the traditional test for determining the voluntariness of a person's response. *Miranda*, of course, did not reach investigative questioning of a person not in custody, which is most directly analogous to the situation of a consent search, and it assuredly did not indicate that such questioning ought to be deemed inherently coercive. See p. —, *supra*.

It is also argued that the failure to require the Government to establish knowledge as a prerequisite to a valid consent, will relegate the Fourth Amendment to the special province of "the sophisticated, the knowledgeable,

³⁶ As noted above, *supra*, n. 29, the present case does not require a determination of what effect custodial conditions might have on a search authorized solely by an alleged consent.

and the privileged." We cannot agree. The traditional definition of voluntariness we accept today has always taken into account evidence of minimal schooling, low intelligence, and the lack of any effective warnings to a person of his rights; and the voluntariness of any statement taken under those conditions has been carefully scrutinized to determine whether it was in fact voluntarily given.³⁷

E

Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required

³⁷ See, e. g., *Clewis v. Texas*, 386 U. S. 707; *Culombe v. Connecticut*, *supra*; *Reck v. Pate*, *supra*; *Payne v. Arkansas*, 356 U. S. 560; *Fikes v. Alabama*, 352 U. S. 191; *Harris v. South Carolina*, 338 U. S. 68; *Haley v. Ohio*, *supra*.

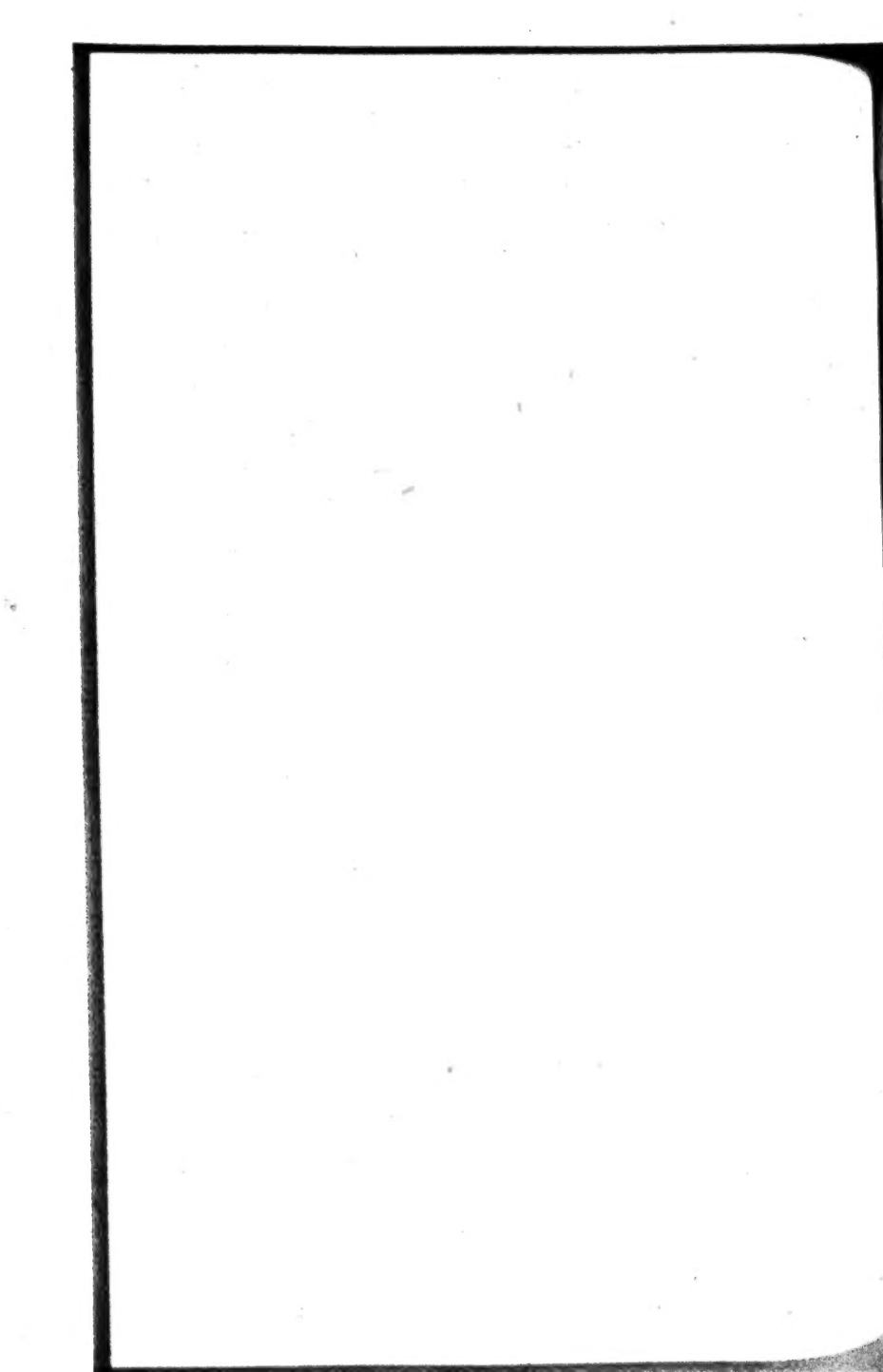
MR. JUSTICE WHITE once answered a similar argument:

"The Court may be concerned with a narrower matter: the unknowing defendant who responds to police questioning because he mistakenly believes that he must and that his admissions will not be used against him The failure to inform an accused that he need not answer and that his answers may be used against him is very relevant indeed to whether the disclosures are compelled. Cases in this Court, to say the least, have never placed a premium on ignorance of constitutional rights. If an accused is told he must answer and does not know better, it would be very doubtful that the resulting admissions could be used against him. When the accused has not been informed of his rights at all the Court characteristically and properly looks very closely at the surrounding circumstances." *Escobedo v. Illinois*, *supra*, at 499 (dissenting opinion).

to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.³⁸ Because the California courts followed these principles in affirming the respondent's conviction, and because the Court of Appeals for the Ninth Circuit in remanding for an evidentiary hearing required more, its judgment must be reversed.

It is so ordered.

³⁸ The State also urges us to hold that a violation of the exclusionary rule may not be raised by a state or federal prisoner in a collateral attack on his conviction, and thus asks us to overturn our contrary holdings in *Kaufman v. United States*, 394 U. S. 217; *Whitely v. Warden*, 401 U. S. 560; *Harris v. Nelson*, 394 U. S. 286; and *Mancusi v. De Forte*, 392 U. S. 364. Since we have found no valid Fourth and Fourteenth Amendment claim in this case, we do not consider that question.



SUPREME COURT OF THE UNITED STATES

No. 71-732

Merle R. Schneckloth, Super-
intendent, California Con-
servation Center,
Petitioner,
v.
Robert Clyde Bustamonte.

On Writ of Certiorari to
the United States Court
of Appeals for the Ninth
Circuit.

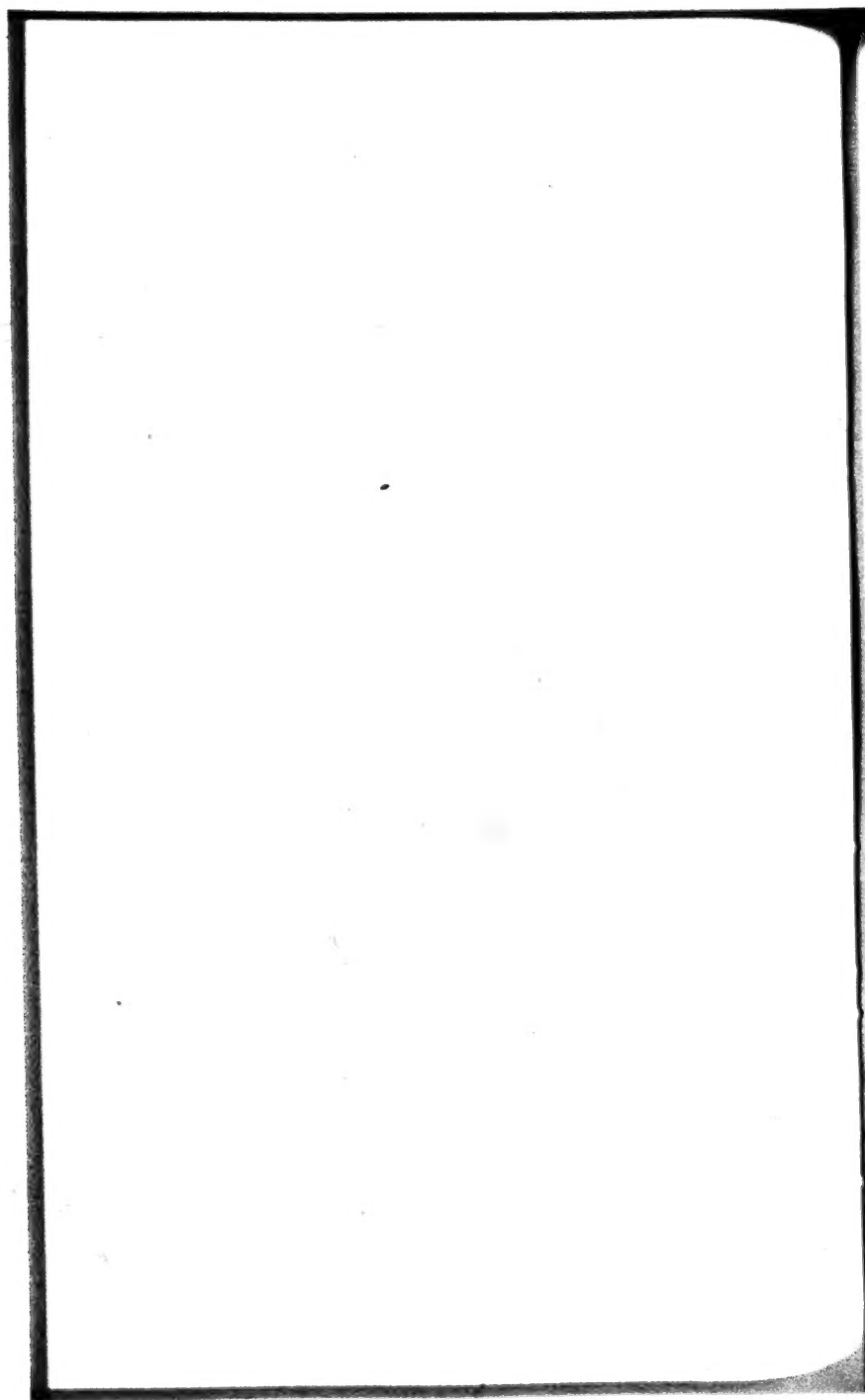
[May 29, 1973]

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion and its judgment.

At the time *Kaufman v. United States*, 394 U. S. 217 (1969), was decided, I, as a member of the Court of Appeals (but not of its panel) whose order was there reversed, found myself in agreement with the views expressed by Mr. Justice Harlan, writing for himself and my Brother STEWART in dissent. 394 U. S., at 242. My attitude has not changed in the four years that have passed since *Kaufman* was decided.

Although I agree with nearly all that MR. JUSTICE POWELL has to say in his detailed and persuasive concurring opinion, *post*, p. —, I refrain from joining it at this time because, as MR. JUSTICE STEWART's opinion reveals, it is not necessary to reconsider *Kaufman* in order to decide the present case.



SUPREME COURT OF THE UNITED STATES

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Merle R. Schneekloth, Superintendent, California Conservation Center,
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Robert Clyde Bustamonte.

[May 29, 1973]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring.

While I join the opinion for the Court, it does not address what seems to me the overriding issue briefed and argued in this case: the extent to which federal habeas corpus should be available to a state prisoner seeking to exclude evidence from an allegedly unlawful search and seizure. I would hold that federal collateral review of a state prisoner's Fourth Amendment claims—claims which rarely bear on innocence—should be confined solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts. In view of the importance of this issue to our system of criminal justice, I think it appropriate to express my views.

I

Although petitions for federal habeas corpus assert a wide variety of constitutional questions, we are concerned in this case only with a Fourth Amendment claim that an unlawful search occurred and that the state court erred in failing to exclude the evidence obtained therefrom. A divided court in *Kaufman v. United States*, 394 U. S. 271 (1969), held that collateral review of search and seizure claims was ap-

propriate on motions filed by federal prisoners under 28 U. S. C. §2255. Until *Kaufman* a substantial majority of the federal courts of appeals had considered that claims of unlawful search and seizure "are not proper matters to be presented by a motion to vacate sentence under § 2255" *Id.*, at 220. The rationale of this view was fairly summarized by the Court:

"The denial of Fourth Amendment protection against unreasonable searches and seizures, the government's argument runs, is of a different nature from denials of other constitutional rights which we have held subject to collateral attack by federal prisoners. For unlike a claim of denial of effective counsel or of violation of the privilege against self incrimination, as examples, a claim of illegal search and seizure does not impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers." *Kaufman*, at 224.

In rejecting this rationale, the Court noted that under prior decisions "the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial,"¹ and concluded that there was no basis for restricting "access by federal prisoners with illegal search and seizure claims to federal collateral remedies, while placing no similar restriction on access by state prisoners." *Kaufman*, at 225-226. In short, on petition for habeas corpus or collateral review filed in a federal district court, whether by state prisoners under § 2254 or federal prisoners under

¹ Cases cited as examples included *Mancusi v. DeForte*, 392 U. S. 364 (1968); *Carafas v. LaValle*, 391 U. S. 234 (1968); *Warden v. Hayden*, 387 U. S. 294 (1967).

§ 2255, the present rule is that Fourth Amendment claims may be asserted and the exclusionary rule must be applied in precisely the same manner as on direct review. Neither the history or purpose of habeas corpus, the desired prophylactic utility of the exclusionary rule as applied to Fourth Amendment claims, nor any sound reason relevant to the administration of criminal justice in our federal system justifies such a power.

II

The federal review involved in this Fourth Amendment case goes well beyond the traditional purpose of the writ of habeas corpus. Much of the present perception of habeas corpus stems from a revisionist view of the historic function that writ was meant to perform. The critical historical argument has focused on the nature of the writ at the time of its incorporation in our Constitution and at the time of the Habeas Corpus Act of 1867, the direct ancestor of contemporary habeas corpus statutes.² In *Fay v. Noia*, 372 U. S. 391, 426 (1963), the Court interpreted the writ's historic position as follows:

"At the time the privilege of the writ was written into the Federal Constitution it was settled that

² Act of Feb. 5, 1867, c. 28, § I, 14 Stat. 385, provided that: "the several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any persons may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States. . . ."

Federal habeas review for those in state custody is now authorized by 28 U. S. C. § 2254 (a):

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was embodied in the written Constitution. Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum. Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings."

If this were a correct interpretation of the relevant history, the present wide scope accorded the writ would have arguable support, despite the impressive reasons to the contrary. But recent scholarship has cast grave doubt on *Fay's* version of the writ's historic function.

It has been established that both the Framers of the Constitution and the authors of the 1867 Act expected that the scope of habeas corpus would be determined with reference to the writ's historic, common law development.³ Chief Justice Marshall early referred to the common law conception of the writ in determining its constitutional and statutory scope, *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 93-94 (1807), *Ex parte Watkins*, 28 U. S. (3 Pet.) 193, 201-202 (1830), and Professor Oaks has noted that "when the 1867 Congress provided that persons restrained of their liberty in violation of the Constitution could obtain a writ of habeas corpus from a federal court, it undoubtedly intended—except to

³ Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 466 (1963); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 451-456 (1966).

the extent the legislation provided otherwise—to incorporate the common-law uses and functions of this remedy.”⁴

It thus becomes important to understand exactly what was the common-law scope of the writ both when embraced by our Constitution and incorporated into the Habeas Corpus Act of 1867. Two respected scholars have recently explored precisely these questions.⁵ Their efforts have been both meticulous and revealing. Their conclusions differ significantly from those of the Court in *Fay v. Noia*, that habeas corpus traditionally has been available “to remedy any kind of governmental restraint contrary to fundamental law.” *Id.*, at 405.

The considerable evidence marshalled by these scholars need not be restated here. Professor Oaks makes a convincing case that under the common law of habeas corpus at the time of the adoption of the Constitution, “once a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court.”⁶ Certainly that was what Chief Justice Marshall understood when he stated:

“This writ (habeas corpus) is, as has been said, in the nature of a writ of error which brings up the body of the prisoner with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judg-

⁴ Oaks, *supra*, n. 3, at 452.

⁵ Professor Paul M. Bator of Harvard Law School and Professor Dallin H. Oaks formerly of the University of Chicago School of Law. Citations to the relevant articles are in n. 3, *supra*.

⁶ Oaks, *supra*, n. 3, at 468.

ment withdrawn by law from the revision of this court, is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment, and reexamine the charges on which it was rendered. A judgment, in its nature, concludes the subject on which it was rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as a judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it." *Ex parte Watkins, supra*, at 202-203.

The respect shown under common law for the finality of the judgment of a committing court at the time of the Constitution and in the early 19th Century did not, of course, explicitly contemplate the operation of habeas corpus in the context of federal-state relations. Federal habeas review for state prisoners was not available until passage of the Habeas Corpus Act of 1867. Yet there is no evidence that Congress intended that Act to jettison the respect theretofore shown by a reviewing court for prior judgments by a court of proper jurisdiction. The Act "received only the most perfunctory attention and consideration in the Congress; indeed there were complaints that its effects could not be understood at all."⁷ In fact, as Professor Bator notes, it would require overwhelming evidence, which simply is not present, to conclude that the 1867 Congress intended "to tear habeas corpus entirely out of the context of its historical meaning and scope and convert it into an ordinary writ of error with respect to all federal questions in all criminal cases."⁸ Rather, the House Judiciary Committee when

⁷ Bator, *supra*, n. 3, at 475-476.

⁸ *Id.*, at 475.

it reviewed the Act in 1884 understood that it was not "contemplated by its framers or . . . properly . . . construed to authorize the overthrow of the final judgments of the state courts of general jurisdiction, by the inferior Federal judges. . . ."

Much, of course, has transpired since that first Habeas Corpus Act. See *Fay v. Noia*, *supra*, at 449-463 (Harlan, J., dissenting). The scope of federal habeas corpus for state prisoners has evolved from a quite limited inquiry into whether the committing state court had jurisdiction, *Andrews v. Swartz*, 156 U. S. 272 (1895); *In re Moran*, 203 U. S. 96 (1906); to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims, *Frank v. Magnum*, 237 U. S. 309 (1915); and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions, *Brown v. Allen*, 344 U. S. 443 (1953). No one would now suggest that this Court be imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries. But recognition of that reality does not liberate us from all historical restraint. The historical evidence demonstrates that the purposes of the writ, at the time of the adoption of the Constitution, were tempered by a due regard for the finality of the judgment of the committing court. This regard was maintained substantially intact when Congress, in the Habeas Act of 1867, first extended federal habeas review to the delicate interrelations of our dual court systems.

III

Recent decisions, however, have tended to depreciate the importance of the finality of prior judgments in criminal cases. *Kaufman*, *supra*, at 228; *Sanders v.*

* H. R. Rep. No. 730, 48th Cong., 1st Sess., 5 (1884), quoted in *Bator*, *supra*, n. 3, at 477.

United States, 373 U. S. 1, 8 (1963); *Fay*, *supra*, at 424. This trend may be a justifiable evolution of the use of habeas corpus where the one in state custody raises a constitutional claim bearing on his innocence. But the justification for disregarding the historic scope and function of the writ is measurably less apparent in the typical Fourth Amendment claim asserted on collateral attack. In this latter case, a convicted defendant is most often asking society to redetermine a matter with no bearing at all on the basic justice of his incarceration.

Habeas corpus indeed *should* provide the added assurance for a free society that no innocent man suffers an unconstitutional loss of liberty. The Court in *Fay* described habeas corpus as a remedy for "what society deems to be intolerable restraints," and recognized that those to whom the writ should be granted "are persons whom society has grievously wronged and for whom belated liberation is little enough compensation." 372 U. S., at 401-402, 440-441. The Court there acknowledged that the central reason for the writ lay in the remedying of injustice to the individual. Recent commentators have recognized the same core concept, one noting that "where *personal liberty* is involved, a democratic society . . . insists it is less important to reach an unshakeable decision than to *do justice* (emphasis added)," ¹⁰ and another extolling the use of the writ in *Leyra v. Denno*, 347 U. S. 556 (1954), with the assertion that "but for federal habeas corpus, these two men would have gone to their deaths for crimes of which they were not guilty." ¹¹

¹⁰ Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 Yale L. J. 50, 65 (1956).

¹¹ Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461, 496-497 (1960). See also Note, 66 Yale L. J. 50, 65:

"The doctrines of collateral estoppel and *res judicata* subordinate the search for truth to the policy of ending litigation. . . . The

I am aware that history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt. Traditionally, the writ was unavailable even for many constitutional pleas grounded on a claimant's innocence, while many contemporary proponents of expanded employment of the writ would permit its issuance for one whose deserved confinement was never in doubt. We are now faced, however, with the task of accommodating the historic respect for the finality of the judgment of a committing court with recent Court expansions of the role of the writ. This accommodation can best be achieved, with due regard to all of the values implicated, by recourse to the central reason for habeas corpus: the affording of means, through an extraordinary writ, of redressing an *unjust* incarceration.

Federal habeas review of search and seizure claims is rarely relevant to this reason. Prisoners raising Fourth Amendment claims collaterally usually are quite *justly* detained. The evidence obtained from searches and seizures is often "the clearest proof of guilt" with a very high content of reliability.¹² Rarely is there any contention that the search rendered the evidence unreliable or that its means cast doubt upon respondent's guilt. The words of Justice Black drive home the point:

"A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any

policy against incarcerating or executing an *innocent* man, however, should far outweigh the desired termination of litigation." (Emphasis added.)

¹² Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970).

shadow of a doubt that the defendant is guilty." *Kaufman v. United States*, 394 U. S. 217, 237 (1969) (Black, J., dissenting).

Habeas corpus review of search and seizure claims thus brings a deficiency of our system of criminal justice into sharp focus: a convicted defendant asserting no constitutional claim bearing on innocence and relying solely on an alleged unlawful search, is now entitled to federal habeas review of state conviction and the likelihood of release if the reviewing court concludes that the search was unlawful. That federal courts would actually re-determine constitutional claims bearing no relation to the prisoner's innocence with the possibility of releasing him from custody if the search is held unlawful not only defeats our societal interest in a rational legal system but serves no compensating ends of personal justice.

IV

This unprecedented extension of habeas corpus far beyond its historic bounds and in disregard of the writ's central purpose is an anomaly in our system sought to be justified only by extrinsic reasons which will be addressed in Part V of this opinion. But first let us look at the costs of this anomaly—costs in terms of serious intrusions on other societal values. It is these other values that have been subordinated—not to further justice on behalf of arguably innocent persons but all too often to serve mechanistic rules quite unrelated to justice in a particular case. Nor are these neglected values unimportant to justice in the broadest sense or to our system of Government. They include (i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of jus-

tice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded.

When raised on federal habeas, a claim generally has been considered by two or more tiers of state courts. It is the solemn duty of these courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accord with federal law. The task which federal courts are asked to perform on habeas is thus most often one that has or should have been done before. The presumption that "if a job can be well done once, it should not be done twice" is sound and one calculated to utilize best "the intellectual, moral, and political resources involved in the legal system."¹³

Those resources are limited but demand on them constantly increases. There is an insistent call on federal

¹³ Bator, *supra*, n. 3, at 451.

The conventional justifications for extending federal habeas corpus to afford collateral review of state court judgments were summarized in *Kaufman*, 394 U. S., at 225-226, as follows:

"... the necessity that federal courts have the 'last say' with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights, the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state convictions. . . ."

Each of these justifications has merit in certain situations, although the asserted inadequacy of state procedures and unsympathetic attitude of state judges are far less realistic grounds of concern than in years past. The issue, fundamentally, is one of perspective and a rational balancing. The appropriateness of federal collateral review is evident in many instances. But it hardly follows that, in order to promote the ends of individual justice which are the foremost concerns of the writ, it is necessary to extend the scope of habeas review indiscriminately. This is especially true with respect to federal review of Fourth Amendment claims with the consequent denigration of other important societal values and interests.

courts both in civil actions, many novel and complex, which affect intimately the lives of great numbers of people and in original criminal trials and appeals which deserve our most careful attention.¹⁴ To the extent the federal courts are required to reexamine claims on collateral attack,¹⁵ they deprive primary litigants of their prompt availability and mature reflection. After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication.

The present scope of federal habeas corpus also has worked to defeat the interest of society in a rational point

¹⁴ Briefly, civil filings in United States district courts increased from 58,293 in 1961 to 96,173 in 1972. Total appeals commenced in the United States courts of appeals advanced from 4,204 in 1961 to 14,535 in 1972. Petitions for federal habeas corpus filed by state prisoners jumped from 1,020 in 1961 to 7,949 in 1972. Though habeas petitions filed by state prisoners did decline from 9,063 in 1970 to 7,949 in 1972, the overall increase from 1,000 at the start of the last decade is formidable. Furthermore, civil rights prisoner petitions under 42 U. S. C. § 1983 increased from 1,072 to 3,348 in the past five years. Some of these challenged the fact and duration of confinement and sought release from prison and must now be brought as actions for habeas corpus, *Preiser v. Rodriguez*, — U. S. — (1973). See 1972 Annual Report of the Director of the Administrative Office of the United States Court, pp. II-5, II-22, II-28-32.

¹⁵ CHIEF JUSTICE BURGER has illustrated the absurd extent to which relitigation is sometimes allowed:

"In some of these multiple trial and appeal cases [on collateral attack] the accused continued his warfare with society for eight, nine, ten years and more. In one case . . . more than 50 appellate judges reviewed the case on appeals." Address before the Association of the Bar of the City of New York, N. Y. L. J., Feb. 19, 1970, at 1.

The English courts, "long admired for their fair treatment of accused persons," have never so extended habeas corpus. Friendly, *supra*, n. 12, at 145.

of termination for criminal litigation. Professor Amsterdam has identified some of the finality interests at stake in collateral proceedings:

"They involved (a) duplication of judicial effort; (b) delay in setting the criminal proceeding at rest; (c) inconvenience and possibly danger in transporting a prisoner to the sentencing court for hearing; (d) postponed litigation of fact, hence litigation which will often be less reliable in reproducing the facts (i) respecting the postconviction claim itself and (ii) reflecting the issue of guilt if the collateral attack succeeds in a form which allows a retrial. . . ."

He concludes that:

". . . in combination, these finality considerations amount to a more or less persuasive argument against the cognizability of any particular collateral claim, the strength of the argument depending upon the nature of the claim, the manner of its treatment (if any) in the conviction proceedings, and the circumstances under which collateral litigation must be had."¹⁶

No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for

¹⁶ Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 318, 383-384 (1964). The article addresses the problem of collateral relief for federal prisoners, but its rationale applies forcefully to federal habeas for state prisoners as well.

further litigation but rather forward to rehabilitation and to becoming a constructive citizen.¹⁷

Nowhere should the merit of this view be more self-evident than in collateral attack on an allegedly unlawful search and seizure, where the petitioner often asks society to *redetermine* a claim with no relationship at all to the justness of his confinement. Professor Amsterdam has noted that "for reasons common to all search and seizure claims," he "would hold even a slight finality interest sufficient to deny the collateral remedy."¹⁸ But, in fact, a strong finality interest militates against allowing collateral review of search and seizure claims. Apart from the duplication of resources inherent in most habeas corpus proceedings, the validity of a search and seizure claim frequently hinges on a complex matrix of events which may be difficult indeed for the habeas court to disinter especially where, as often happens, the trial occurred years before the collateral attack and the state record is thinly sketched.¹⁹

Finally, the present scope of habeas corpus tends to undermine the values inherent in our federal system of government. To the extent that every state criminal

¹⁷ Mr. Justice Harlan put it very well:

"Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders v. United States*, 373 U. S. 1, 24, 25 (1963) (dissenting opinion).

¹⁸ Amsterdam, *supra*, n. 16, at 388.

¹⁹ The latter occurs for various reasons, namely, failure of the accused to raise the claim at trial, a determination by the state courts that the claim did not merit a hearing, or a recent decision of this Court extending rights of the accused (although, on Fourth Amendment claims, such decisions have seldom been applied retroactively, see, e. g., *Linkletter v. Walker*, 381 U. S. 618 (1965)).

judgment is to be subject indefinitely to broad and repetitive federal oversight, we render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems.²⁰ The present expansive scope of federal habeas review has prompted no small friction between state and federal judiciaries. Justice Paul C. Reardon of the Massachusetts Supreme

²⁰ The dispersion of power between state and federal government is constitutionally premised, as Justice Harlan observed:

"... it surely would be shallow not to recognize that the structure of our political system accounts no less for the free society we have. Indeed, it was upon the structure of government that the founders primarily focused in writing the Constitution. Out of bitter experience they were suspicious of every form of all-powerful central authority and they sought to assure that such a government would never exist in this country by structuring the federal establishment so as to diffuse power between the executive, legislative, and judicial branches. The diffusion of power between federal and state authority serves the same ends and takes on added significance as the size of the federal bureaucracy continues to grow." Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A. B. A. J. 943, 944 (1963).

The Justice recognized that problems of habeas corpus jurisdiction were "of constitutional dimensions going to the heart of the division of judicial powers in a federal system." *Fay v. Noia*, 372 U. S. 391, 464 (1963) (Harlan, J., dissenting). Nor have such perceptions ever been the product of but a single Justice. As the Court noted in an historic decision on the conflicting realms of state and federal judicial power:

"The Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence." *Erie v. Tompkins*, 304 U. S. 64, 78-79 (1938), quoting Mr. Justice Field in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 401 (1893).

Judicial Court and then President of the National Center for State Courts, in identifying problems between the two systems noted bluntly that "the first, without question, is the effect of federal habeas corpus proceedings on State courts." He spoke of the "humiliation of review from the full bench of the highest State appellate court to a single United States District judge." Such broad federal habeas powers encourage in his view the "growing denigration of the State courts and their functions in the public mind."²¹ In so speaking Justice Reardon echoed the words of Professor Bator:

"I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."²²

In my view, this Court has few more pressing responsibilities than to restore the mutual respect and the balanced sharing of responsibility between the state and federal courts which our tradition and the Constitution itself so wisely contemplate. This can be accomplished without retreat from our inherited insistence that the writ of habeas corpus retain its full vitality as a means of redressing injustice.

This case involves only a relatively narrow aspect of the appropriate reach of habeas corpus. The specific issue before us, and the only one that need be decided at this time, is the extent to which a state prisoner may obtain federal habeas corpus review of a Fourth Amend-

²¹ Address by Hon. Paul C. Reardon, President, National Center for State Courts, at the annual dinner of the Section of Judicial Administration, American Bar Association, San Francisco, California, August 14, 1972, at 5, 9, and 10.

²² Bator, *supra*, n. 3, at 451.

ment claim. Whatever may be formulated as a more comprehensive answer to the important broader issues (whether by clarifying legislation or in subsequent decisions), Mr. Justice Black has suggested what seems to me to be the appropriate threshold requirement in a case of this kind:

"... I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of doubt on his guilt." *Kaufman v. United States, supra*, 242 (dissenting opinion).

In a perceptive analysis Judge Henry J. Friendly expressed a similar view. He would draw the line against habeas corpus review in the absence of a "colorable claim of innocence":

"... with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence."²³

Where there is no constitutional claim bearing on innocence, the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim should be confined solely to the question whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim. Limiting the scope of habeas review in this manner would

²³ Friendly, *supra*, n. 12, 142, *et seq.* Judge Friendly's thesis, as he develops it, would encompass collateral attack broadly both within the federal system and with respect to federal habeas for state prisoners. Subject to the exceptions carefully delineated in his article, Judge Friendly would apply the criterion of a "colorable showing of innocence" to any collateral attack of a conviction, including claims under the Fifth and Sixth as well as the Fourth Amendments. *Id.*, 151-157. In this case we need not consider anything other than the Fourth Amendment claims.

reduce the role of the federal courts in determining the merits of constitutional claims with no relation to a petitioner's innocence and contribute to the restoration of recently neglected values to their proper place in our criminal justice system.

V

The importance of the values referred to above is not questioned. What, then, is the reason which has prompted this Court in recent decisions to extend habeas corpus to Fourth Amendment claims largely in disregard of its history as well as these values? In addressing Mr. Justice Black's dissenting view that constitutional claims raised collaterally should be relevant to the petitioner's innocence, the majority in *Kaufman* noted:

"It [Mr. Justice Black's view] brings into question *the propriety of the exclusionary rule itself*. The application of that rule is not made to turn on the existence of a possibility of innocence; rather, exclusion of illegally obtained evidence is deemed necessary to protect the right of all citizens, not merely the citizen on trial, to be secure against unreasonable searches and seizures." *Kaufman*, at 229. (Emphasis supplied.)

The exclusionary rule has occasioned much criticism, largely on grounds that its application permits guilty defendants to go free and law-breaking officers to go unpunished.²⁴ The oft-asserted reason for the rule is to

²⁴ See *Bivens v. Six Unknown Agents*, 403 U. S. 388, 411 (BURGER, C. J., dissenting); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. Crim. L. C. & P. S. 255, 256 (1961); see also J. Wilson, *Varieties of Police Behavior* (1968); Wigmore on Evidence, § 2184, at 51-52 (McNaughton ed.), and H. J. Friendly, *Benchmarks* 260-261 (1967), suggesting that even at trial the exclusionary rule should be limited to exclusion of "the fruit of activity intentionally or flagrantly illegal." But see *Kamisar, Public Safety v. Individual Liberties: Some "Facts" and "Theories,"*

deter illegal searches and seizures by the police, *Elkins v. United States*, 364 U. S. 206, 217 (1960); *Mapp v. Ohio*, *supra*, at 656 (1961); *Linkletter v. Walker*, 381 U. S. 618, 636; *Terry v. Ohio*, 392 U. S. 1, 29 (1968).²⁵ The efficacy of this deterrent function, however, has been brought into serious question by recent empirical research. Whatever the rule's merits on an initial trial and appeal²⁶—a question not in issue here—the case for

53 J. Crim. L. C. & P. S. 171, 188–190 (1962), and Kamisar, On the Tactics of Police-Prosecution Oriented Critics of the Courts, 49 Cornell L. Q. 436 (1964).

²⁵ These expressions antedated the only scholarly empirical research, Mr. JUSTICE STEWART having noted in *Elkins v. United States*, 364 U. S. 206, 218 (1960), that “[e]mpirical statistics are not available” as to the efficacy of the rule—a situation which continued until Professor Oaks’ study. Indeed, in referring to the basis for the exclusionary rule, Professor Oaks noted that it has been supported—not by facts—but by “recourse to polemic, rhetoric and intuition.” Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 755 (1970). See also Burger, Who Will Watch the Watchman?, 14 Am. U. L. Rev. 1, (1964).

I mention the controversy over the exclusionary rule—not to suggest here its total abandonment (certainly not in the absence of some other deterrent to deviant police conduct) but rather to emphasize its precarious and undemonstrated basis, especially when applied to a Fourth Amendment claim on federal habeas review of a state court decision.

²⁶ The most searching empirical study of the efficacy of the exclusionary rule was made by Professor Dallin H. Oaks, who concluded that “as a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure.” *Supra*, n. 14, at 755. Professor Oaks, though recognizing that conclusive data may not yet be available, summarized the results of his study as follows:

“There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution. What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring

collateral application of the rule is an anemic one. On collateral attack, the exclusionary rule retains its major liabilities while the asserted benefit of the rule dissolves. For whatever deterrent function the rule may serve when applied on trial and appeal becomes greatly attenuated when, months or years afterward, the claim surfaces for collateral review. The impermissible conduct has long since occurred, and the belated wrist slap of state police by federal courts harms no one but society on whom the convicted criminal is newly released.²⁷

Searches and seizures are an opaque area of the law: flagrant Fourth Amendment abuses will rarely escape

the police. The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.

"The use of the exclusionary rule imposes excessive costs on the criminal justice system. It provides no recompense for the innocent and it frees the guilty. It creates the occasion and incentive for largescale lying by law enforcement officers. It diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police. Only a system with limitless patience with irrationality could tolerate the fact that where there has been one wrong, the defendant's, he will be punished, but where there have been two wrongs, the defendant's and the officer's, both will go free. This would not be an excessive cost for an effective remedy against police misconduct, but it is a prohibitive price to pay for an illusory one." *Id.*, at 755.

Despite a conviction that the exclusionary rule is a "failure," Professor Oaks would not abolish it altogether until there is something to take its place. He recommends "an effective tort remedy against the offending officer or his employer." He notes that such a "tort remedy would give courts an occasion to rule on the content of constitutional rights (the Canadian example shows how), and it would provide the real consequence needed to give credibility to the guarantee." *Id.*, at 756-757.

²⁷ "As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance." Amsterdam, *supra*, n. 16, at 389:

detection but there is a vast twilight zone with respect to which one Justice has stated that our own "decisions are hardly noted for their predictability,"²⁸ and another has observed that this Court was "bifurcating elements too infinitesimal to be split."²⁹ Serious Fourth Amendment infractions can be dealt with by state judges or by this Court on direct review. But the nonfrivolous Fourth Amendment claims that survive for collateral attack are most likely to be in this grey, twilight area, where the law is difficult for courts to apply, let alone for the policeman on the beat to understand. This is precisely the type of case where the deterrent function of the exclusionary rule is least efficacious, and where there is the least justification for freeing a duly convicted defendant.³⁰

Our decisions have not encouraged the thought that what may be an appropriate constitutional policy in one context automatically becomes such for all times and all seasons. In *Linkletter v. Walker*, 381 U. S. 618, 629 (1965), the Court recognized the compelling practical considerations against retroactive application of the exclusionary rule. Rather than viewing the rule as having eternal constitutional verity, the Court decided to

"weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. We believe this approach is particularly correct with reference to the Fourth Amendment's prohibitions as to unreasonable searches and seizures." *Linkletter*, at 629.

²⁸ *Ker v. California*, 374 U. S. 23, 67 (1963) (Harlan, J., concurring in result).

²⁹ *Coolidge v. New Hampshire*, 403 U. S. 443, 493 (1971) (BURGER, C. J., dissenting in part and concurring in part). THE CHIEF JUSTICE was quoting Mr. Justice Stone of the Minnesota Supreme Court.

³⁰ *Id.*, *supra*, n. 12, at 162-163.

Such a pragmatic approach compelled the Court to conclude that the rule's deterrent function would not be advanced by its retrospective application:

"The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. . . . Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Linkletter*, at 637.

See also *Desist v. United States*, 394 U. S. 244 (1969).

The same practical, particularized analysis of the exclusionary rule's necessity also was evident in *Walder v. United States*, 347 U. S. 62 (1954), when the Court permitted the Government to utilize unlawfully seized evidence to impeach the credibility of a defendant who had first testified broadly in his own defense. The Court held, in effect, that the policies protected by the exclusionary rule were outweighed in this case by the need to prevent perjury and assure the integrity of proceedings at trial. The Court concluded that to apply the exclusionary rule in such circumstances "would be a perversion of the Fourth Amendment." *Walder*, at 65. The judgment in *Walder* revealed most pointedly that the policies behind the exclusionary rule are neither absolute nor all-encompassing, but rather must be weighed and balanced against a competing and more compelling policy, namely the need for effective determination of truth at trial.

In sum: the case for the exclusionary rule varies with the setting on which it is imposed. It makes little sense to extend the *Mapp* exclusionary rule to a federal habeas proceeding where its asserted deterrent effect must be least efficacious, and its obvious harmful consequences persist in full force.

VI

The final inquiry is whether the above position conforms to 28 U. S. C. § 2254 (a) which provides:

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

The trend in recent years has witnessed a proliferation of constitutional rights, "a vast expansion of the claims of error in criminal cases for which a resourceful defense lawyer can find a constitutional basis."³¹ Federal habeas jurisdiction has been extended far beyond anyone's expectation or intendment when the concept of "custody in violation of the Constitution" now in § 2254 (a) first appeared in federal law over a century ago.³²

Justice Black was clearly correct in noting that "not every conviction based in part on a denial of a constitutional right is subject to attack by habeas corpus or § 2255 proceedings after a conviction has become final." *Kaufman*, at 232 (Black, J., dissenting). No evidence exists that Congress intended every allegation of a constitutional violation to afford an appropriate basis for collateral review: indeed, the latest revisions of the Federal Habeas Corpus Statute in 1966³³ and the enactment of § 2254 (a) came at the time a majority of the courts of

³¹ Friendly, *supra*, n. 12, at 156.

³² See § II, *supra*.

³³ The 1966 revision to the Federal Habeas Corpus Statute enacted among other things, the present 28 U. S. C. §§ 2254 (a), (d), (e), and (f).

appeals held that claims of unlawful search and seizure "are not proper matters to be presented by a motion to vacate sentence under § 2255 but can only be properly presented by appeal from the conviction." *Kaufman v. United States*, *supra*, at 220, quoting *Warren v. United States*, 311 F. 2d 673, 675 (1963).³⁴ Though the precise discussion in *Kaufman* concerned the claims of federal prisoners under § 2255, the then existing principle of a distinction between review of search and seizure claims in direct and collateral proceedings clearly existed.

There is no indication that Congress intended to wipe out this distinction. Indeed, the broad purpose of the 1966 amendments pointed in the opposite direction. The report of the Senate Judiciary Committee notes that:

"Although only a small number of these [habeas] applications have been found meritorious, the applications in their totality have imposed a heavy burden on the Federal courts. . . . The bill seeks to alleviate the unnecessary burden by introducing a greater degree of finality of judgments in habeas corpus proceedings." S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966).³⁵

The House Report states similarly that:

"While in only a small number of these applications have the petitioners been successful, they nevertheless have not only imposed an unnecessary

³⁴ See *Kaufman*, at 220-221, nn. 3 and 4, for a listing of the respective positions of the courts of appeals.

³⁵ The letter from Circuit Judge Orie L. Phillips, Chairman of the Committee on Habeas Corpus of the Judicial Conference of the United States, which sponsored the 1966 legislation, to the Chairman of the Senate Subcommittee on Improvements in Judicial Machinery also strongly emphasized the necessity of expediting "the determination in Federal courts of nonmeritorious and repetitious applications for the writ by State court prisoners." S. Rep., at 5.

burden on the work of the Federal courts but have also greatly interfered with the procedures and processes of the State courts by delaying, in many cases, the proper enforcement of their judgments." H. R. Rep. No. 1892, 89th Cong., 2d Sess., 5 (1966).

This most recent congressional expression on the scope of federal habeas corpus reflected the sentiment, shared alike by judges and legislators, that the writ has overrun its historical banks to inundate the dockets of federal courts and denigrate the role of state courts. Though Congress did not address the precise question at hand, nothing in 2254 (a), the state of the law at the time of its adoption, or the historical uses of the language "custody in violation of the Constitution" from which 2254 (a) is derived,³⁶ compels a holding that rulings of state courts on claims of unlawful search and seizure must be reviewed and redetermined in collateral proceedings.

VII

Perhaps no single development of the criminal law has had consequences so profound as the escalating use, over the past two decades, of federal habeas corpus to reopen and readjudicate state criminal judgment. I have commented in Part IV above on the far-reaching consequences: The burden on the system³⁷—in terms of demands on the courts, prosecutors, defense attorneys and

³⁶ See § II, *supra*.

³⁷ Mr. Justice Jackson, concurring nearly 20 years ago in *Brown v. Allen*, 344 U. S. 443, 532 (1953), lamented the "flood of stale, frivolous and repetitious petitions [for federal habeas corpus by state prisoners which] inundate the dockets of the lower courts and swell our own." *Id.*, at 536. The inundation which concerned Mr. Justice Jackson consisted of 541 such petitions. In 1971, the latest year for which figures are available, state prisoners alone filed 7,949 petitions for habeas in federal district courts, over 14 times the number filed when Justice Jackson voiced his misgivings.

other personnel and facilities; the absence of efficiency and finality in the criminal process, frustrating both the deterrent function of the law and the effectiveness of rehabilitation; the undue subordination of state courts, with the resulting exacerbation of state-federal relations; and the subtle erosion of the doctrine of federalism itself. Perhaps the single most disquieting consequence of open-ended habeas review is reflected in the prescience of Mr. Justice Jackson's warning that "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones."³⁸

If these consequences flowed from the safeguarding of constitutional claims of innocence they should, of course, be accepted as a tolerable price to pay for cherished standards of justice at the same time that efforts are pursued to find more rational procedures. Yet, as illustrated by the case before us today, the question on habeas corpus is too rarely whether the prisoner was innocent of the crime for which he was convicted;³⁹ rather, it is too frequently whether some evidence of undoubted probative value has been admitted in violation of an exclusionary rule ritualistically applied without due regard to whether it has the slightest likelihood of achieving its avowed prophylactic purpose.

It is this paradox of a system, which so often seems to subordinate substance to form, that increasingly provokes criticism and lack of confidence. Indeed, it is

³⁸ *Brown v. Allen*, *supra*, at 537.

³⁹ Commenting on this distortion of our criminal justice system, Justice Walter Schaefer of the Illinois Supreme Court has said: "What bothers me is that almost never do we have a genuine issue of guilt or innocence today. The system has so changed that what we are doing in the courtroom is trying the conduct of the police and that of the prosecutor all along the line." Address before Conference for the Study of Democratic Institutions, June 1968, cited by Friendly, *supra*, n. 12, at 145, n. 12.

difficult to explain why a system of criminal justice deserves respect which allows repetitive reviews of convictions long since held to have been final at the end of the normal process of trial and appeal where the basis for reexamination is not even that the convicted defendant was innocent. There has been a halo about the "Great Writ" that no one would wish to dim. Yet one must wonder whether the stretching of its use far beyond any justifiable purpose will not in the end weaken rather than strengthen the writ's vitality.

SUPREME COURT OF THE UNITED STATES

No. 71-732

Merle R. Schneckloth, Superintendent, California Conservation Center,
Petitioner,
v.

Robert Clyde Bustamonte.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 29, 1973]

MR. JUSTICE DOUGLAS, dissenting.

I agree with the Court of Appeals that "verbal assent" to a search is not enough, that the fact that consent was given to the search does not imply that the suspect knew that the alternative of a refusal existed. 488 F. 2d, at 700. As that court stated

"under many circumstances a reasonable person might read an officer's 'may I' as the courteous expression of a demand backed by the force of law." *Id.*, at 701.

A considerable constitutional guarantee rides on this narrow issue. At the time of the search there was no probable cause to believe that the car contained contraband or other unlawful articles. The car was stopped only because a headlight and the license plate light were burned out. The car belonged to Alcalá's brother from whom it was borrowed and Alcalá had a driver's license. Traffic citations were appropriately issued. The car was searched, the present record showing that Alcalá consented. But whether Alcalá knew he had the right to refuse, we do not know. All the Court of Appeals did was to remand the case to the District Court for a finding—and if necessary, a hearing on that issue.

I would let the case go forward on that basis. The long, time-consuming contest in this Court might well wash out. At least we could be assured that, if it came back, we would not be rendering an advisory opinion. Had I voted to grant this petition, I would suggest we dismiss it as improvidently granted. But being in the minority, I am bound by the rule of four.

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Robert Clyde Bustamonte.

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Circuit.

[May 29, 1973]

MR. JUSTICE BRENNAN, dissenting.

The Fourth Amendment specifically guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." We have consistently held that governmental searches conducted pursuant to a validly obtained warrant or reasonably incident to a valid arrest do not violate this guarantee. Here, however, as the Court itself recognizes, no search warrant was obtained and the State does not even suggest "that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants." *Ante*, at —. As a result, the search of the vehicle can be justified solely on the ground that the driver gave his consent—that is, that he waived his Fourth Amendment right "to be secure" against an otherwise "unreasonable" search. The Court holds today that an individual can effectively waive this right even though he is totally ignorant of the fact that, in the absence of his consent, such invasions of his privacy would be constitutionally prohibited. It wholly escapes me how our citizens can meaningfully be said to have waived something as pre-

cious as a constitutional guarantee without ever being aware of its existence. In my view, the Court's conclusion is supported neither by "linguistics," nor by "epistemology," nor, indeed, by "common sense." I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

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[May 29, 1973]

MR. JUSTICE MARSHALL, dissenting.

Several years ago, MR. JUSTICE STEWART reminded us that "[t]he Constitution guarantees . . . a society of free choice. Such a society presupposes the capacity of its members to choose." *Ginsberg v. New York*, 390 U. S. 629, 649 (1968) (concurring opinion). I would have thought that the capacity to choose necessarily depends upon knowledge that there is a choice to be made. But today the Court reaches the curious result that one can choose to relinquish a constitutional right—the right to be free of unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request to search.¹ I cannot agree, and therefore dissent.

¹ The Court holds that Alcala's consent to search was shown, in the state court proceedings, to be constitutionally valid as a relinquishment of his Fourth Amendment rights. In those proceedings, no evidence was adduced as to Alcala's knowledge of his right to refuse assent. The Court of Appeals for the Ninth Circuit, whose judgment is today reversed, would have required the State to produce such evidence. As discussed below, *infra*, p. 10, the Court of Appeals did not hold that the police must inform a subject of investigation of his right to refuse assent as an essential predicate to their effort to secure consent to search.

I

I believe that the Court misstates the true issue in this case. That issue is not, as the Court suggests, whether the police overbore Alcala's will in eliciting his consent, but rather, whether a simple statement of assent to search, without more,² should be sufficient to permit the police to search and thus act as a relinquishment of Alcala's constitutional right to exclude the police.³ This Court has always scrutinized with great care claims that a person has foregone the opportunity to assert constitutional rights. See, e. g., *Fuentes v. Shevin*, 407 U. S. 67 (1972); *D. H. Overmyer Co. v. Frick Co.*, 405 U. S. 174 (1972); *Boykin v. Alabama*, 395 U. S. 238 (1969); *Carnley v. Cochran*, 369 U. S. 506 (1962). I see no reason to give the claim that a person consented to a search any less rigorous scrutiny. Every case in this Court involving this kind of search has therefore spoken of consent as a waiver.⁴ See, e. g., *Amos v. United*

² The Court concedes that the police lacked probable cause to search. *Ante*, pp. 9-10. At the time the search was conducted, there were three police vehicles near Alcala's car. 270 Cal. App. 2d 648, 651, 76 Cal. Rptr. 17, 19 (1969). Perhaps the police in fact had some reason, not disclosed in this record, to believe that a search would turn up incriminating evidence. But it is also possible that the late hour and the number of men in Alcala's car suggested to the first officer on the scene that it would be prudent to wait until other officers had arrived before investigating any further.

³ Because Bustamonte was charged with possessing stolen checks found in the search at which he was present, he has standing to object to the search even though he claims no possessory or proprietary interest in the car. *Jones v. United States*, 362 U. S. 257 (1960). Cf. *People v. Ibarra*, 60 Cal. 2d 460, 34 Cal. Rptr. 863 (1963); *People v. Perez*, 62 Cal. 2d 769, 44 Cal. Rptr. 326 (1965).

⁴ The Court reads *Davis v. United States*, 328 U. S. 582 (1946), as upholding a search like the one in this case on the basis of consent. But it was central to the reasoning of the Court in that case that the items seized were the property of the Government temporarily in Davis' custody. See *id.*, at 587-593. The agents of the

States, 255 U. S. 313, 317 (1921); *Zap v. United States*, 328 U. S. 624, 628 (1946); *Johnson v. United States*, 333 U. S. 10, 13 (1948).⁵ Perhaps one skilled in linguistics or epistemology can disregard those comments, but I find them hard to ignore.

To begin, it is important to understand that the opinion of the Court is misleading in its treatment of the issue here in three ways. First, it derives its criterion for determining when a verbal statement of assent to search operates as a relinquishment of a person's right

Government were thus simply demanding that property to which they had a lawful claim be returned to them. Because of this, the Court held that "permissible limits of persuasion are not so narrow as where *private* papers are sought." *Id.*, at 593. The opinion of the Court therefore explicitly disclaimed stating a general rule for ordinary searches for evidence. That the distinction, for purposes of Fourth Amendment analysis, between mere evidence and contraband or instrumentalities has now been abolished, *Warden v. Hayden*, 387 U. S. 294 (1967), is no reason to disregard the fact that when *Davis* was decided, that distinction played an important role in shaping analysis.

In *Zap v. United States*, 328 U. S. 624, 628 (1946), the Court held that "when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he *voluntarily waived* such claim to privacy which he otherwise might have had as respects business documents related to those contracts." (Emphasis added.) Because Zap had signed a contract specifically providing that his records would be open at all time to the Government, he had indeed waived his right to keep those records private. Cf. *United States v. Biswell*, 406 U. S. 311 (1972).

⁵ Aside from *Zap* and *Davis*, *supra*, n. 6, I have found no cases decided by this Court explicitly upholding a search based on the consent of the defendant. It is hardly surprising, then, that "[t]he approach of the Court of Appeals for the Ninth Circuit finds no support in any of our decisions," *ante*, p. 11. But in nearly every case discussing the problem at length, the Court referred to consent as a waiver. And it mischaracterizes those cases to describe them as analyzing the totality of the circumstances, *ante*, n. 31. See pp. 7-8, *infra*.

to preclude entry from a justification of consent searches that is inconsistent with our treatment in earlier cases of exceptions to the requirements of the Fourth Amendment, and that is not responsive to the unique nature of the consent search exception. Second, it applies a standard of voluntariness that was developed in a very different context, where the standard was based on policies different from those involved in this case. Third, it mischaracterizes our prior cases involving consent searches.

A

The Court assumes that the issue in this case is, what are the standards by which courts are to determine that consent is voluntarily given? It then imports into the law of search and seizure standards developed to decide entirely different questions about coerced confessions.⁶

The Fifth Amendment, in terms, provides that no person "shall be compelled in any criminal case to be a witness against himself." Nor is the interest protected by the Due Process Clause of the Fourteenth Amendment any different. The inquiry in a case where a confession is challenged as having been elicited in an unconstitutional manner is, therefore, whether the behavior of the police amounted to compulsion of the defendant.⁷

⁶ That this application of the "domino" method of adjudication is misguided is shown, I believe, by the fact that the phrase "voluntary consent" seems redundant in a way that the phrase "voluntary confession" does not.

⁷ The Court used the terms "voluntary" or "involuntary" in those cases as short-hand labels for an assessment of the police behavior in light of the particular characteristics of the individual defendant because behavior that might not be coercive of some individuals might nonetheless compel others to give incriminating statements. See, e. g., *Haley v. Ohio*, 332 U. S. 596, 599 (1948); *Stein v. New York*, 346 U. S. 156, 185 (1953); *Fikes v. Alabama*, 352 U. S. 191 (1957).

Because of the nature of the right to be free of compulsion, it would be pointless to ask whether a defendant knew of it before he made a statement, no sane person would knowingly relinquish a right to be free of compulsion. Thus, the question of compulsion and of violation of the right itself are inextricably intertwined. The cases involving coerced confessions therefore pass over the question of knowledge of that right as irrelevant, and turn directly to the question of compulsion.

Miranda v. Arizona, 384 U. S. 436 (1966), confirms this analysis. There the Court held that certain warnings must be given to suspects prior to their interrogation so that the inherently coercive nature of in-custody questioning would be diminished by the suspect's knowledge that he could remain silent. But, although those warnings of course convey information about various rights of the accused, the information is intended only to protect the suspect against acceding to the other coercive aspects of police interrogation. While we would not ordinarily think that a suspect could waive his right to be free of coercion, for example, we do permit suspects to waive the rights they are informed of by police warnings, on the belief that such information in itself sufficiently decreases the chance that a statement would be elicited by compulsion. *Id.*, at 475-476. Thus, nothing the defendant did in the cases involving coerced confessions was taken to operate as a relinquishment of his rights; certainly the fact that the defendant made a statement was never taken to be a relinquishment of the right to be free of coercion.⁸

⁸ I of course agree with the Court's analysis to the extent that it treats a verbal expression of assent as no true consent when it is elicited through compulsion. *Ante*, p. 11. Since, in my view, it is just as unconstitutional to search after coercing consent as it is to search after uninformed consent, I agree with the rationale of *Amos*

B

In contrast, this case deals not with "coercion," but with "consent," a subtly different concept to which different standards have been applied in the past. Freedom from coercion is a substantive right, guaranteed by the Fifth and Fourteenth Amendments. Consent, however, is a mechanism by which substantive requirements, otherwise applicable, are avoided. In the context of the Fourth Amendment, the relevant substantive requirements are that searches be conducted only after evidence justifying them has been submitted to an impartial magistrate for a determination of probable cause. There are, of course, exceptions to these requirements based on a variety of exigent circumstances that make it impractical to invalidate a search simply because the police failed to get a warrant.* But none of the exceptions relating to the overriding needs of law enforcement are applicable when a search is justified solely by consent. On the contrary, the needs of law enforcement are

v. *United States*, 255 U. S. 313. (1921), *Johnson v. United States*, 333 U. S. 10 (1948), and *Bumper v. North Carolina*, 391 U. S. 543 (1968). That an alternative rationale might have been used in those cases seems to me irrelevant.

* See, e. g., *Coolidge v. New Hampshire*, 403 U. S. 443 (1971); *Chimel v. California*, 395 U. S. 752 (1969); *Warden v. Hayden*, 387 U. S. 294 (1967).

In *Chimel*, we explained that searches incident to arrest were justified by the need to protect officers from attacks by the persons they have arrested, and by the need to assure that easily destructible evidence in the reach of the suspect will not be destroyed. 395 U. S., at 762-763. And in *Coolidge*, we said that searches of automobiles on the highway are justified because an alerted criminal might easily drive the evidence away while a warrant was sought. 403 U. S., at 459-462. In neither situation is police convenience alone a sufficient reason for establishing an exception to the warrant requirement. Yet the Court today seems to say that convenience alone justifies consent searches.

significantly more attenuated, for probable cause to search may be lacking but a search permitted if the subject's consent has been obtained. Thus, consent searches are permitted not because such an exception to the requirements of probable cause and warrant is essential to proper law enforcement, but because we permit our citizens to choose whether or not they wish to exercise their constitutional rights. Our prior decisions simply do not support the view that a meaningful choice has been made solely because no coercion was brought to bear on the subject.

For example, in *Bumper v. North Carolina*, 391 U. S. 543 (1968), four law enforcement officers went to the home of Bumper's grandmother. They announced that they had a search warrant, and she permitted them to enter. Subsequently, the prosecutor chose not to rely on the warrant, but attempted to justify the search by the woman's consent. We held that consent could not be established "by showing no more than acquiescence to a claim of lawful authority," *id.*, at 548-549. We did not there inquire into all the circumstances, but focused on a single fact, the claim of authority, even though the grandmother testified that no threats were made. *Id.*, at 547 n. 8. It may be that, on the facts of that case, her consent was under all the circumstances, involuntary, but it is plain that we did not apply the test adopted by the Court today. And, whatever the posture of the case when it reached this Court, it could not be said that the police in *Bumper* acted in a threatening or coercive manner, for they did have the warrant they said they had; the decision not to rely on it was made long after the search, when the case came into court.¹⁰

¹⁰ The Court's interpretation of *Johnson v. United States*, 333 U. S. 10 (1948), a similar case, is baffling. The Court in *Johnson* did not in fact analyze the totality of the circumstances, as the

That case makes it clear that police officers may not courteously order the subject of a search simply to stand aside while the officers carry out a search they have settled on. Yet there would be no coercion or brutality in giving that order. No interests that the Court today recognizes would be damaged in such a search. Thus, all the police must do is conduct what will inevitably be a charade of asking for consent. If they display any firmness at all, a verbal expression of assent will undoubtedly be forthcoming. I cannot believe that the protections of the Constitution mean so little.

II

My approach to the case is straightforward and, to me, obviously required by the notion of consent as a relinquishment of Fourth Amendment rights. I am at a loss to understand why consent "cannot be taken literally to mean a 'knowing' choice." *Ante*, p. 6. In fact, I have difficulty in comprehending how a decision made without knowledge of available alternatives can be treated as a choice at all.

If consent to search means that a person has chosen to forego his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police. The Court appears, however, to reject even the modest proposition that, if the subject of a search convinces the trier of fact that he did not know of his right to refuse assent to a police request for permission to search, the search must be held unconstitutional. For it says only that "knowledge of the right to refuse consent is one factor to be taken into account." *Ante*, p. 9. I find this incomprehensible.

Court now argues, *ante*, n. 31; the single fact that the police claimed authority to search when in truth they lacked such authority conclusively established that no valid consent had been given.

I can think of no other situation in which we would say that a person agreed to some course of action if he convinced us that he did not know that there was some other course he might have pursued. I would therefore hold, at a minimum, that the prosecution may not rely on a purported consent to search if the subject of the search did not know that he could refuse to give consent. That, I think, is the import of *Bumper v. North Carolina*, *supra*. Where the police claim authority to search yet in fact lack such authority, the subject does not know that he may permissibly refuse them entry, and it is this lack of knowledge that invalidates the consent.

If one accepts this view, the question then is a simple one: must the Government show that the subject knew of his rights, or must the subject show that he lacked such knowledge?

I think that any fair allocation of the burden would require that it be placed on the prosecution. On this question, the Court indulges in what might be called the "straw man" method of adjudication. The Court responds to this suggestion by overinflating the burden. And, when it is suggested that the *prosecution's* burden of proof could be easily satisfied if the police informed the subject of his rights, the Court responds by refusing to require the *police* to make a "detailed" inquiry. *Ante*, pp. 26-27. If the Court candidly faced the real question of allocating the burden of proof, neither of these maneuvers would be available to it.

If the burden is placed on the defendant, all the subject can do is to testify that he did not know of his rights. And I doubt that many trial judges will find for the defendant simply on the basis of that testimony. Precisely because the evidence is very hard to come by, courts have traditionally been reluctant to require a party to prove negatives such as the lack of

knowledge. See, e. g., 9 J. Wigmore, Evidence 274 (3d ed. 1940); F. James, Civil Procedure § 7.8 (1965); E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 75-76 (1956).

In contrast, there are several ways by which the subject's knowledge of his rights may be shown. The subject may affirmatively demonstrate such knowledge by his responses at the time the search took place, as in *United States v. Curiale*, 414 F. 2d 744 (CA2 1969). Where, as in this case, the person giving consent is someone other than the defendant, the prosecution may require him to testify under oath. Denials of knowledge may be disproved by establishing that the subject had, in the recent past, demonstrated his knowledge of his rights, for example, by refusing entry when it was requested by the police. The prior experience or training of the subject might in some cases support an inference that he knew of his right to exclude the police.

The burden on the prosecutor would disappear, of course, if the police, at the time they requested consent to search, also told the subject that he had a right to refuse consent and thus his decision to refuse would be respected. The Court's assertions to the contrary notwithstanding, there is nothing impractical about this method of satisfying the prosecution's burden of proof.¹¹ It must be emphasized that the decision about informing the subject of his rights would lie with the officers seek-

¹¹ The proposition rejected in the cases cited by the Court in nn. 13 and 14, was that, as in *Miranda v. Arizona*, 384 U. S. 436 (1966), a statement to the subject of his rights must be given as an indispensable prerequisite to a request for consent to search. This case does not require us to address that proposition, for all that is involved here is the contention that the prosecution could satisfy the burden of establishing the knowledge of the right to refuse consent by showing that the police advised the subject of a search, that is sought to be justified by consent, of that right.

ing consent. If they believed that providing such information would impede their investigation, they might simply ask for consent, taking the risk that at some later date the prosecutor would be unable to prove that the subject knew of his rights or that some other basis for the search existed.

The Court contends that if an officer paused to inform the subject of his rights, the informality of the exchange would be destroyed. I doubt that a simple statement by an officer of an individual's right to refuse consent would do much to alter the informality of the exchange, except to alert the subject to a fact that he surely is entitled to know. It is not without significance that for many years the agents of the Federal Bureau of Investigation have routinely informed subjects of their right to refuse consent, when they request consent to search. Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 Col. L. Rev. 130, 143 n. 74 (citing letter from J. Edgar Hoover). The reported cases in which the police have informed subject of their right to refuse consent show, also, that the information can be given without disrupting the casual flow of events. See, e. g., *United States v. Miller*, 395 F.2d 116 (CA7 1968). What evidence there is, then, rather strongly suggests that nothing disastrous would happen if the police, before requesting consent, informed the subject that he had a right to refuse consent and that his refusal would be respected.¹²

¹² The Court's suggestion that it would be "unrealistic" to require the officers to make "the detailed type of examination" involved when a court considers whether a defendant has waived a trial right, *ante*, pp. 26-27, deserves little comment. The question before us relates to the inquiry to be made in court when the prosecution seeks to establish that consent was given. I therefore do not address the Court's strained argument that one may waive constitu-

I must conclude, with some reluctance, that when the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights. Of course it would be "practical" for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the boards. But such a practical advantage is achieved only at the cost of permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb.

I find nothing in the opinion of the Court to dispel my belief that, in such a case, as the Court of Appeals for the Ninth Circuit said, "[u]nder many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law." *Bustamonte v. Schneckloth*, 448 F. 2d 699, 701. Most cases, in my view, are akin to *Bumper v. North Carolina*, 391 U. S. 543 (1968): consent is ordinarily given as acquiescence in an implicit claim of authority

tional rights without making a knowing and intentional choice so long as the rights do not relate to the fairness of a criminal trial. I would suggest, however, that that argument is fundamentally inconsistent with the law of unconstitutional conditions. See, e. g., *Perry v. Sindermann*, 408 U. S. 593 (1972); *Shapiro v. Thompson*, 394 U. S. 618 (1969); *Sherbert v. Verner*, 374 U. S. 398 (1963); *Speiser v. Randell*, 357 U. S. 513 (1958). The discussion of *United States v. Wade*, 388 U. S. 218 (1967), *ante*, pp. 20-21, also seems inconsistent with the opinion of MR. JUSTICE STEWART in *Kirby v. Illinois*, 406 U. S. 682 (1972). In any event, I do not understand how one can relinquish a right without knowing of its existence, and that is the only issue in this case.

to search. Permitting searches in such circumstances, without any assurance at all that the subject of the search knew that, by his consent, he was relinquishing his constitutional rights. I cannot believe that this is sanctioned by the Constitution.

III

The proper resolution of this case turns, I believe, on a realistic assessment of the nature of the interchange between citizens and the police, and of the practical import of allocating the burden of proof in one way rather than another. The Court seeks to escape such assessments by escalating its rhetoric to unwarranted heights, but no matter how forceful the adjectives the Court uses, it cannot avoid being judged by how well its image of these interchanges accords with reality. Although the Court says without real elaboration that it "cannot agree," *ante*, p. 30, the holding today confines the protection of the Fourth Amendment against searches conducted without probable cause to the sophisticated, the knowledgeable, and, I might add, the few.¹³ In the final analysis, the Court now sanctions a game of blindman's buff, in which the police always have the upper hand, for the sake of nothing more than the convenience of the police. But the guarantees of the Fourth Amendment were never intended to shrink before such an ephemeral and changeable interest. The Framers of the Fourth Amendment struck the balance against this sort of convenience and in favor of certain basic civil rights. It is not for this Court to restrike that balance because of

¹³ The Court's half-hearted defense, that lack of knowledge is to be "taken into account," rings rather hollow, in light of the apparent import of the opinion that even a subject who proves his lack of knowledge may nonetheless have consented "voluntarily," under the Court's peculiar definition of voluntariness.

its own views of the needs of law enforcement officers. I fear that that is the effect of the Court's decision today.

It is regrettable that the obsession with validating searches like that conducted in this case, so evident in the Court's hyperbole, has obscured the Court's vision of how the Fourth Amendment was designed to govern the relationship between police and citizen in our society. I believe that experience and careful reflection show how narrow and inaccurate that vision is, and I respectfully dissent.